Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CRAIG A. HANKS,
Superintendent, Wabash Valley
Correctional Facility,
Petitioner,

v.

JOSEPH W. FINFROCK,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR CERTIORARI

KAREN M. FREEMAN-WILSON
Attorney General of Indiana
JON LARAMORE
Counsel of Record
Deputy Attorney General
219 State House
Indianapolis, IN 46204
317-233-6582

Question Presented

The Antiterrorism and Effective Death Penalty Act (AEDPA) requires a prisoner to obtain a "certificate of appealability" before appealing denial of habeas corpus when the "detention complained of arises out of process issued by a State court." Finfrock sought habeas relief from prison disciplinary convictions that lengthened his incarceration. After the district court denied his petitions, the court of appeals ruled he needed no certificate of appealability to pursue an appeal.

Does the AEDPA require Finfrock to obtain a certificate of appealability to appeal the denial of habeas relief?

Parties Below

All parties are named in the caption.

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No.

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Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR CERTIORARI

Craig Hanks, Superintendent of the Wabash Valley Correctional Facility, asks the Court to grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Opinions below

The Seventh Circuit's opinion is at 216 F.3d 626 (7th Cir. 2000). It is printed in the Appendix at 1a to

42a. The appeal addressed five separate judgments of dismissal, all from the United States District Court for the Southern District of Indiana. None was reported. The judgments and denials of certificates of appealability are printed in the Appendix at 43a to 78a.

Jurisdiction

The Court of Appeals issued its opinion June 22, 2000. This Court has jurisdiction under 28 U.S.C. §1254(1).

Statutes Implicated

This case construes 28 U.S.C. §2253(c)(1)(A). The full text of §2253 follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Statement of the Case

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) to limit federal judicial review of State criminal proceedings and expedite capital cases. One provision of AEDPA limits frivolous appeals by requiring prisoners to make a "substantial showing" of violation of a federal right to obtain a certificate of appealability, which is a prerequisite to appealing adverse district court determinations in habeas cases.

The Seventh Circuit held that no certificate of appealability is required when a prisoner appeals denial of habeas relief in connection with prison disciplinary convictions. This Court's review is warranted because the Seventh Circuit's decision creates a clear conflict between circuits, vitiates

Congressional intent to keep frivolous prisoner litigation from clogging the courts, and misapplies the governing statute.

1. The AEDPA was enacted in 1996 as part of a multi-faceted effort to reduce frivolous prisoner litigation and expedite federal collateral review. The AEDPA, aimed at habeas litigation, was passed at the same time as the Prison Litigation Reform Act (PLRA), which targeted prisoners' 42 U.S.C. §1983 litigation. P.L. 104-132 (AEDPA); 104-134, §§ 801-810 (PLRA). The AEDPA limited habeas litigation by installing limitations periods, altering the standard of review, increasing deference to State-court factfinding, limiting evidentiary hearings, and restricting successive petitions. P.L. 104-132, §§101, 104, 106, *codified at* 28 U.S.C. §§2244(d), 2254(d), (e), 2255.

The AEDPA also strengthened the previous requirement that prisoners obtain "certificates of probable cause" as a prerequisite to appeal, replacing it with the prerequisite that a habeas petitioner obtain a certificate of appealability stating that he had made a "substantial showing of the denial of a federal constitutional right." 28 U.S.C. §2253(c)(2). The "substantial showing of the denial of a federal constitutional right" standard in §2253(c)(2) is more stringent than the standard to obtain a certificate of probable cause. [1]

[1] To obtain a certificate of probable cause, a prisoner had only to "demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463

2. On May 28 and June 19, 1997, Joseph W. Finfrock filed a total of five petitions for habeas corpus attacking six separate disciplinary sanctions imposed on him at the Wabash Valley Correctional Facility in Carlisle, Indiana. These petitions appealed disciplinary convictions of (1) threatening another with bodily harm (two convictions for two separate incidents); (2) committing battery (also two convictions for two separate incidents); (3) attempting escape; and (4) destroying, altering or damaging state property. All but one of these disciplinary convictions resulted in increases in Finfrock's time of incarceration.

In each of the five cases, a federal district court denied the petition. In one case, the district court determined that the sanction imposed on Finfrock – 90 days of disciplinary segregation – did not implicate a liberty interest protected by the Constitution. App. 53a; *see Sandin v. Conner*, 515 U.S. 472 (1995). In the other four cases, the district courts ruled that Finfrock's due process rights were not violated in the prison conduct proceedings. App. 46a-49a, 54a-56a, 59a-61a, 65a-68a, 73a-78a.

Finfrock appealed each of these denials of habeas corpus. In each appeal, the district court denied Finfrock's request for a certificate of appealability under 28 U.S.C. §2253(c) and required payment of a filing fee under 28 U.S.C. §1915(g). App. 44a, 51a, 58a, 63a, 70a.

U.S. 880, 892 n.4. (1983), quoting *Gordon v. Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980) (emphasis and brackets in original).

3. The Seventh Circuit consolidated Finfrock's five appeals and joined them with *Walker v. O'Brien*, Seventh Circuit Nos. 96-4010 and 98-1328, appeals of discipline dispensed to a prisoner at the Federal Correctional Institution in Greenville, Illinois. App. 4a-5a. The Court appointed Dean Howard B. Eisenberg of Marquette University Law School to brief questions propounded by the court.[2]

The Seventh Circuit panel decided three issues, and Superintendent Hanks seeks certiorari only on the third issue. First, the panel held that *Felker v. Turpin*, 518 U.S. 651 (1996), and the language of §2254 indicate that §2254 is the exclusive means for state prisoners to obtain habeas relief if they are held pursuant to a state court judgment (as opposed to being held pre-conviction or pre-extradition). App.

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[2] The Seventh Circuit directed the State of Indiana and Dean Eisenberg, as amicus curiae, to brief "the following issues, as well as any other issues counsel deems appropriate:

> "1. Whether Finfrock properly filed these cases, which challenge the constitutionality of prison disciplinary proceedings resulting in the loss of good-time credits, under 28 U.S.C. § 2254? *See Newlin v. Helman*, 123 F.3d 429, 437 (7th Cir. 1997);
>
> "2. If Finfrock's cases were properly filed under § 2254, whether the Prison Litigation Reform Act ("PLRA"), amending 28 U.S.C. § 1915, should apply to petitions filed under § 2254 that do not constitute the functional continuation of criminal prosecutions? *See Newlin*, 123 F.3d at 158;
>
> "3. Whether 28 U.S.C. § 2253(c)(1)(A) requires Finfrock to obtain certificates of appealability before perfecting his appeals from the district court decisions?"

13a-15a. Thus, state prisoners cannot evade the requirements of §2254 – including the requirements added in 1996 by AEDPA – by attaching the §2241 label to their petitions. App. 13a-15a.

Second, the panel held that PLRA filing fee requirements do not apply to habeas petitions challenging prisoners' disciplinary convictions. The panel thereby overruled circuit precedent, *Newlin v. Helman*, 123 F.3d 429 (7th Cir. 1997), which applied the PLRA to prisoners' habeas petitions challenging disciplinary convictions because they were not the "functional continuation" of the criminal prosecution.. App. 16a. The panel determined that this Court's decisions draw no distinctions between habeas petitions that challenge the underlying conviction and those that seek release from confinement for other reasons. App. 17a-20a (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Edwards v. Balisok*, 520 U.S. 641 (1997)). The panel also held that, although the PLRA applies to "civil actions" filed by prisoners, and although habeas corpus proceedings are "civil actions," habeas petitions relating to prison discipline are not intended to fall within that definition because Congress addressed habeas cases in the AEDPA, not the PLRA. App. 21a-23a.

Third, the panel held that the certificate of appealability requirement in AEDPA did not apply to habeas petitions seeking relief from prison discipline. App. 26a. It reasoned that the statute requires a certificate of appealability only when the prisoner challenges confinement arising "out of process issued by a State court," and petitions like Finfrock's

challenge confinement arising instead from an administrative panel issuing discipline. App. 24a (quoting 28 U.S.C. §2253(c)(1)(A)). Also, because prison disciplinary proceedings often are subject to less rigorous state review, prisoners should not have to obtain a certificate of appealability to obtain judicial review. App. 25a-26a.

Under Circuit Rule 40, the panel's decision was circulated to all active judges because it overruled circuit precedent on the PLRA and created a conflict between the circuits on the AEDPA. Judge Easterbrook dissented from denial of *en banc* consideration of the cases, and Chief Judge Posner and Judge Manion joined his dissent. App. 30a-42a

Most pertinent to this petition, the dissenters criticized the panel's approach to certificates of appealability as contrary to the panel's own approach to the PLRA filing fee issue and lacking foundation in the language of the AEDPA. On the filing fee issue, the panel had rejected the distinction between habeas petitions challenging convictions and those challenging prison discipline, but it adopted exactly that distinction as to the certificate of appealability requirement. App. 38a-40a.

The dissenters also concluded that the plain language of §2253(c)(1)(A) – requiring certificates of appealability when a prisoner's confinement "arises out of process issued by a State court" – covers habeas petitions challenging disciplinary convictions. Although habeas petitions challenging prison discipline do not directly challenge state court process, they do apply to prisoners whose custody

arises from state court process, which is all that §2253(c)(1)(A) requires. App. 39a-41a.[3]

Reasons for Granting the Writ

I. The Seventh Circuit's opinion creates a conflict between the circuits.

The Seventh Circuit's opinion creates a direct conflict between the circuits on the certificate of appealability issue. The Seventh Circuit now requires no certificate of appealability on appeals of habeas denials relating to disciplinary convictions, but the Fifth and Tenth Circuits do require them. *Montez v. McKinna*, 208 F.3d 862, 866-69 (10th Cir. 2000); *Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997).

The Seventh Circuit panel held that the certificate of appealability provisions of AEDPA do not apply to all habeas appeals, but only to habeas appeals challenging convictions. App. 26a. Construing the language of 28 U.S.C. §2253(c)(1)(A),

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[3] The dissenters also disagreed with the panel's opinion as to filing fees under the PLRA and would have retained *Newlin*. The dissenters reasoned that the plain language of the PLRA's filing fee provisions – applying to "civil action[s] . . . in forma pauperis" – covers habeas petitions challenging prison discipline. App. 32a-33a. This Court labeled habeas petitions "civil actions" in *Browder v. Director*, 434 U.S. 257, 269 (1978), and *United States v. Morgan*, 346 U.S. 502, 505 & n.4 (1954). App. 32a. The dissenters noted that their position is consistent with the purposes of the PLRA, which included regulating federal court challenges to prison disciplinary proceedings, in whatever form they were presented. App. 33a.

the panel held that habeas petitions challenging prison disciplinary proceedings do not challenge confinement arising "out of process issues by a State court," and therefore are not covered by §2253(c)(1)(A).

Construing the same words, the Tenth Circuit reached the opposite conclusion. *Montez*, 208 F.3d at 867-69. *Montez* concludes that a certificate of appealability is required whenever the prisoner's custody flows from state court process, whatever the nature of his habeas challenge. *Id.* Similarly, but without lengthy analysis, *Hallmark* holds that the AEDPA requires "a certificate of appealability ('COA') before an appeal may proceed in a § 2255 or a § 2254 action." 118 F.3d at 1076.

This conflict affects large numbers of cases. Although the Administrative Office provides no statistics about the percentage of habeas cases relating to discipline, Judge Easterbook noted that they amount to "easily more than a hundred" annually in the Seventh Circuit. App. 31a.[4] Other circuits likely have hundreds more each year.

The Court should not permit this conflict to persist. There is no reason a prisoner in Indiana should be excused from obtaining a certificate of appealability when identically situated prisoners in Colorado or Texas are required to do so.

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[4] In 1999, the Indiana Attorney General was ordered to respond to 262 prison disciplinary habeas cases in federal district court. This figure does not include petitions disposed of summarily without ordering a response from the custodian.

II. The Court should grant the writ to vindicate the policies underlying AEDPA.

The Court should resolve this conflict to ensure that the important policies that motivated Congress to enact AEDPA are carried out uniformly in the Circuits. The "AEDPA's purpose [is] to further the principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines." *Williams v. Taylor*, 120 S.Ct. 1479, 1490 (2000).

A. The panel's decision contradicts the Congressional purpose underlying AEDPA.

To discourage frivolous prisoner litigation, Congress replaced the pre-AEDPA certificate of probable cause with the certificate of appealability requirement, requiring prisoners to meet a higher standard before their appeals could proceed. This requirement eases the burden on States – and not incidentally on the federal courts – when the prisoner is unable to show that his claim has substance.

The certificate of appealability (like the certificate of probable cause) is intended to protect the finality of State determinations in prison disciplinary proceedings by limiting full briefing and federal appellate review to cases where there is a "substantial showing of the denial of a federal constitutional right." 28 U.S.C. §2253(c)(2). The Seventh Circuit's decision undermines this principle,

permitting appeals of right in all prison disciplinary habeas cases with no threshold showing.

The certificate of appealability also is designed to preclude unnecessary federal interference with deployment of State resources. By limiting the number of appeals each State must defend, the certificate of appealability screening system limits the drain on State resources that otherwise would be spent defending frivolous appeals. The Seventh Circuit's decision negates this Congressional purpose, requiring the States to expend substantial resources to defend *all* appeals in prison disciplinary cases, no matter how frivolous.

Indeed, far from implementing the litigation-restricting policies of the AEDPA, the Seventh Circuit panel's decision actually requires prisoners to do *less* than was required before AEDPA was enacted. The certificate of probable cause mandated by pre-AEDPA law applied equally to habeas petitions involving convictions and those involving prison disciplinary matters. *E.g. Crowell v. Walsh*, 151 F.3d 1050 (D.C. Cir. 1998); *Lemieux v. Kirby*, 931 F.2d 1391 (10th Cir. 1991). Far from strengthening barriers against frivolous prisoner litigation, the Seventh Circuit's decision retreats from the pre-AEDPA position.

B. The panel's holding on the PLRA filing-fee issue further undercuts the Congressional purpose.

By holding that neither the AEDPA's certificate of appealability requirement nor the PLRA's filing fee

provisions apply to habeas appeals challenging prison discipline, the Seventh Circuit negated Congressional intent to limit frivolous appeals regarding prison disciplinary matters.

The Seventh Circuit's decision exempts prison-discipline habeas actions from *both* the certificate of appealability requirement in AEDPA *and* the filing fee requirements of the PLRA.[5] Thus, the Seventh Circuit's decision insulates prison-discipline habeas cases from *both* sets of protections against frivolous litigation enacted by Congress in 1996. Congress cannot have intended that this one type of prisoner litigation would be exempt from all of the protections against frivolous litigation created by Congress in the AEDPA and PLRA.

There is no reason to impose the certificate of appealability requirement in habeas cases stemming from direct challenges to convictions, but not to impose it when the issue is a lengthened sentence owing to a disciplinary violation. As Judge Easterbrook noted, "a prisoner who challenges 100%

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[5] The Seventh Circuit panel's approach to the PLRA and AEDPA issues was inconsistent. The panel wrote that one reason the PLRA filing fee requirements did not apply to Finfrock's cases was because the PLRA was not aimed at curbing abuses in habeas: "other courts have reviewed carefully the legislative history of both the PLRA and AEDPA and have concluded that it supports a clear line between civil actions attacking conditions of confinement (subject to the PLRA) and habeas corpus petitions attacking the fact or duration of confinement (subject to the rules governing habeas corpus)." App. 22a. But the panel then rejected that "clear line" when addressing certificates of appealability, determining that no certificate is required to appeal habeas denials relating to prison discipline.

of his prison time (by attacking a conviction or sentence) needs a certificate of appealability and is likely to be turned away without an appellate decision on the merits . . . . [b]ut a prisoner who challenges only 1% or 5% of his prison time [attributable to discipline] is guaranteed an appellate decision on the merits." A-41. The purposes of the AEDPA apply equally to both kinds of cases, so the panel's different treatment of the two kinds of cases negates the Congressional purpose.

III. The Seventh Circuit misconstrued the language of 28 U.S.C. §2253(c).

The Seventh Circuit's construction of AEDPA is incorrect because the plain language of §2253(c)(1)(A) covers appeals of habeas actions arising from prison disciplinary proceedings. The statute requires a certificate of appealability to perfect an appeal of a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court."

Finfrock's habeas petitions – and other appeals in habeas cases arising from prison discipline – fit the category the statute creates. Although the specific decision Finfrock attacks is an administrative decision that affects the length of his detention, his detention nevertheless "arises out of" state court process. Because his detention arises out of State court process, §2253(c)(1)(A) requires that he obtain certificates of appealability for his appeals. *See* App. 39a-41a (Easterbrook, J., dissenting from denial of rehearing *en banc*). *Montez*, 208 F.3d at 867-69. The

Seventh Circuit panel's decision therefore is wrong as a matter of statutory interpretation.

Conclusion

The Court should grant the writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

KAREN M. FREEMAN-WILSON
Attorney General of Indiana

JON LARAMORE
Deputy Attorney General
Counsel of Record

Appendix

Walker v. O'Brien, 216 F.3d 626
(7th Cir. 2000) 1a

Finfrock v. Hanks, No. IP 97-861
(S.D. Ind. 1997)
Entry 43a
Entry Denying Petition 45a

Finfrock v. Hanks, No. IP 97-996
(S.D. Ind. 1997)
Entry Discussing Selected Matters 50a
Entry Denying Petition 52a

Finfrock v. Hanks, No. IP 97-997
(S.D. Ind. 1997)
Entry 57a
Entry Denying Petition 59a

Finfrock v. Hanks, No. IP 97-998
(S.D. Ind. 1997)
Entry 62a
Entry Denying Petition 64a

Finfrock v. Hanks, No. 97-999
(S.D. Ind. 1997)
Entry Discussing Selected Matters 69a
Entry Denying Petition 71a

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 96-4010, 98-1328

Jimmy Walker, *Petitioner-Appellant*,

v.

J.T. O'Brien, *Respondent-Appellee*.

Appeals from the United States District Court for the Western District of Wisconsin.
No. 96-C-661-C--Barbara B. Crabb, Judge.

And

Nos. 97-3792, 97-3797, 97-3798, 97-3799, 97-3800

Joseph W. Finfrock, *Petitioner-Appellant*,

v.

Craig A. Hanks, *Respondent-Appellee*.

Appeals from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
Nos. IP97-0861-C-H/G--David F. Hamilton, Judge,
IP97-0996-C-M/S--Larry J. McKinney, Judge,
IP97-0997-C-T/G--John Daniel Tinder, Judge,
IP97-0998-C-T/G--John Daniel Tinder, Judge,
IP 97-0999-C-H/G--David F. Hamilton, Judge.

Argued January 19, 1999--Decided June 22, 2000

Before Flaum, Ripple, and Diane P. Wood, Circuit Judges.

Diane P. Wood, Circuit Judge.

The passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, § 801 et seq., 110 Stat. 1321-66 (1996), which became effective on April 24, 1996 and April 26, 1996, respectively, ushered in a new and far more restrictive era for prisoner litigation. A critical feature of both statutes was the creation of gatekeeping mechanisms designed to keep frivolous suits out of the federal courts. Both this court and our sister circuits have had occasion during the nearly four years that have passed since the laws took effect to flesh out the rules governing those gatekeeping functions. The cases before us today, which we consolidated for purposes of oral argument and this opinion, raise once again the question of how the statutory gatekeeping mechanisms work together: in particular, whether the fee payment and other rules of the PLRA apply to requests for federal collateral relief, whether under 28 U.S.C. §§ 2241, 2254, or 2255. We say "again," because the court has already spoken to this question in two decisions, *Newlin v. Helman*, 123 F.3d 429 (7th Cir. 1997), and *Thurman v. Gramley*, 97 F.3d 185 (7th Cir.1997), which held that civil filing fees must be paid

pursuant to the PLRA in collateral relief proceedings that are not a functional continuation of the criminal prosecution. See *Newlin*, 123 F.3d at 438.

Experience has shown that our views are not shared by any other court, and so we asked the parties in these two cases to brief the question whether we should reconsider this particular aspect of *Newlin* and *Thurman*.[1] With the benefit of the views from the other circuits, we have concluded that the line *Newlin* draws between collateral attacks that are in some way related to the original criminal proceeding and those that are not should be abandoned. Indeed, we find such a dichotomy inconsistent in principle with the Supreme Court's decisions in *Edwards v. Balisok*, 520 U.S. 641 (1997), and *Preiser v. Rodriguez*, 411 U.S. 475 (1973). We therefore hold today, in keeping with the decisions in *Davis v. Fechtel*, 150 F.3d 486, 488-90 (5th Cir. 1998); *McIntosh v. United States Parole Commission*, 115 F.3d 809, 811-12 (10th Cir. 1997); and *Blair-Bey v. Quick*, 151 F.3d 1036, 1039-41 (D.C. Cir. 1998), that the PLRA does not apply to any requests for collateral relief under 28 U.S.C. §§ 2241, 2254, or 2255. See also *Martin v. Bissonette*, 118 F.3d 871, 874 (1st Cir. 1997) (holding broadly that PLRA does not apply to habeas corpus petitions filed by state prisoners); *Reyes v. Keane*, 90 F.3d 676, 678 (2d Cir. 1996) (same with respect to habeas corpus actions); *Santana v. United States*, 98 F.3d 752, 756 (3d Cir. 1996) (same with respect to actions under 28 U.S.C.

[1] Both *Newlin* and *Thurman* addressed many other questions pertaining especially to the PLRA. As we explain in more detail below, this opinion is limited to the single aspect before us in these cases.

§§ 2254 and 2255); *Smith v. Angelone*, 111 F.3d 1126, 1131 (4th Cir.1997) (same with respect to habeas corpus actions); *Kincade v. Sparkman*, 117 F.3d 949, 950-51 (6th Cir. 1997) (same with respect to actions under 28 U.S.C. §§ 2254 and 2255); *Naddi v. Hill*, 106 F.3d 275, 277 (9th Cir. 1997) (same with respect to habeas corpus actions); *Anderson v. Singletary*, 111 F.3d 801, 806 (11th Cir. 1997) (same with respect to actions under 28 U.S.C. §§ 2254 and 2255). Because Part III of this opinion overrules in part an earlier decision of a panel of this court, and because Parts II and IV address important issues about the administration of the habeas corpus regime, the opinion has been circulated to the full court under Circuit Rule 40(e). A majority of the judges in active service did not wish to rehear the case *en banc*. Chief Judge Posner and Judges Easterbrook and Manion disagreed with that decision, for the reasons expressed in the dissenting opinion of Judge Easterbrook that follows the panel's opinion.

I

The cases that have prompted us to return to the question whether the PLRA applies to collateral relief proceedings both arise from prison disciplinary proceedings. We briefly review the background facts of each one before turning to the central question before us.

A. *Walker v. O'Brien*

Jimmy Walker was involved in a disturbance while he was incarcerated at the Federal Correctional Institution in Greenville, Illinois, which

resulted in his allegedly damaging the door to his cell. A security officer at Greenville issued an incident report charging him with "destroying, altering, or damaging government property." Walker pleaded not guilty to the charge and requested staff representation. He also asked the officials to call his cellmate, inmate Holloway, as a witness at the hearing. Notwithstanding his request, he was not represented at the hearing, and the hearing officer found him guilty based on the incident report, a written statement from Holloway, and a written statement from another correctional officer. He was sentenced to spend 30 days in disciplinary segregation, to forfeit 14 days' good time credit, and to pay $1245 as restitution (representing the cost of repairing the door).[2]

Because his penalty involved the duration of his confinement, Walker initially pursued the administrative remedies that were available to him in the prison system and then filed the present petition for a writ of habeas corpus under 28 U.S.C. § 2241. A collateral attack was the only route available to him, as this court had held in *Miller v. Indiana Department of Corrections*, 75 F.3d 330 (7th Cir. 1996), and the Supreme Court later confirmed in *Edwards v. Balisok, supra*. Walker was required to use § 2241 in particular because 28 U.S.C. § 2255, the habeas corpus substitute for federal prisoners, is

[2] In a stipulation filed with this court on November 19, 1998, the parties agreed that the Bureau of Prisons has adjusted the amount due from $1245 to $593. The lower number reflects the actual cost the government incurred in repairing the door. Walker has been making payments against this debt through deductions from his prison account.

properly used only for challenges to convictions and sentences, while § 2241 is used for other challenges to the fact or duration of confinement. See generally *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998); *Carnine v.United States*, 974 F.2d 924, 927 (7th Cir. 1992).

At that point, matters became a bit complicated. First, invoking the screening mechanism that applies to complaints in "civil actions" filed by prisoners, the district court *sua sponte* dismissed Walker's action prior to service on the ground that it was frivolous because there was some evidence to support the imposition of disciplinary measures. See *Superintendent v. Hill*, 472 U.S. 445 (1985); 28 U.S.C. § 1915A(b)(1). The court declined, however, to impose a filing fee. Walker appealed the dismissal of his case (No. 96-4010) and asked for permission to proceed *in forma pauperis* (IFP). The court denied his request, finding that the appeal was frivolous under 28 U.S.C. § 1915(e)(2)(B) (notwithstanding the fact that the frivolousness of an appeal under this provision is a question for the court of appeals) and that the appeal was not in good faith for purposes of 28 U.S.C. § 1915(a)(3). The latter determination prevented Walker from proceeding IFP on appeal, at least without a ruling from this court, *Celske v. Edwards*, 164 F.3d 396, 397 (7th Cir. 1999); *Newlin*, 123 F.3d at 432, and therefore obligated Walker to pay the full $105 filing fee. He has done so.

After the appeal was underway, Walker filed a motion for reconsideration of the underlying ruling in the district court under Rule 60. The court denied

the motion because the appeal was pending; Walker moved for reconsideration, and the court again ruled against him. Walker then filed a notice of appeal, although it is somewhat unclear which order he intended to challenge (No. 98-1328). The district court ruled that an appeal from the Rule 60 orders would not be in good faith, which again disqualified Walker for IFP treatment and made a second $105 payment due. Walker, who has filed a motion with this court to proceed IFP, has not paid the second fee, and this court has deferred any assessment pending the outcome of this appeal.

B. *Finfrock v. Hanks*

Joseph Finfrock, an inmate of the Wabash Valley Correctional Facility in Indiana, filed a habeas corpus petition under 28 U.S.C. § 2254 in which he attacked five separate prison disciplinary decisions. Prison officials had charged Finfrock with various types of misconduct in violation of prison rules, such as improper possession and damaging of a lawbook, threatening to beat a correctional officer, slamming a fellow prisoner against a door, spitting on a fellow inmate, and attempting to escape during transport from one prison to another. What the proceedings have in common is that Finfrock was adjudged guilty in each one. In three cases he lost good-time credit: 60 days in No. 97-3792, 167 days in No. 97-3797, and 60 days in No. 97-3798. In two cases his classification for purposes of earning good-time credit was reduced (Nos. 97-3798 and 97-3799). In four cases, Finfrock was sentenced to varying time

periods in disciplinary segregation (Nos. 97-3797, 97-3798, 97-3799, and 97-3800).[3]

By order of the U.S. District Court for the Southern District of Indiana, Finfrock was granted permission to proceed IFP, but he was instructed to re-file the action as five separate cases, one per violation. Each case was ultimately dismissed, and Finfrock filed timely notices of appeal. In each case, the presiding district judge denied a certificate of appealability (CA), which is required for appeals in certain collateral relief cases. See 28 U.S.C. § 2253(c). The presiding district judge in each case also denied Finfrock IFP treatment on appeal, both because Finfrock has accumulated three "strikes" under 28 U.S.C. § 1915(g) and because his appeal was taken in bad faith. Finfrock wants to argue to this court that the dismissals were incorrect, because he was denied certain hearing rights, the evidence was insufficient on some charges, he was denied a competent lay advocate, and so on. Before we can reach these claims, however, we must address two questions: (1) whether the PLRA filing fee provisions

[3] We doubt seriously that Finfrock is entitled to pursue No. 97-3800, the one appeal that does not involve a punishment affecting the length of his custody, but rather involves a punishment affecting only the place of his confinement (segregation vs. general population). First, it is questionable whether habeas corpus is the appropriate procedure for challenging this sort of punishment. See *Sylvester v. Hanks*, 140 F.3d 713, 714 (7th Cir. 1998). Second, under *Sandin v.Conner*, 515 U.S. 472, 483-87 (1995), it is unlikely that Finfrock has a protectible liberty interest in avoiding segregation, a requirement for any due process claim. See *Wagner v. Hanks*, 128 F.3d 1173, 1177 (7th Cir. 1997). Nevertheless, since these issues have yet to be briefed, we only mention them here

apply to Finfrock's cases, and (2) whether Finfrock must obtain a CA to pursue his appeals.

II

Two preliminary questions require some attention before we turn to the PLRA issues. First, in each of Walker's and Finfrock's cases the respective district courts concluded that the appeal was not taken in good faith. See 28 U.S.C. § 1915(a)(3). We must decide whether, in light of those determinations, Walker or Finfrock is still entitled to attack the decisions of the district courts that the PLRA applies to a prisoner pursuing collateral relief. Second, there is a question whether state prisoners (such as Finfrock), like their federal counterparts (such as Walker), should be filing habeas corpus petitions that do not challenge their convictions or sentences under § 2241, rather than § 2254. The answer has implications for the need to acquire a certificate of appealability, as well as for the process of characterizing § 2241 actions for PLRA purposes.

A. Bad Faith

It is easiest to begin with the worst case scenario and work backwards. If neither appeal were taken in good faith, then this fact would independently preclude Walker and Finfrock from proceeding IFP regardless of whether the PLRA applied and they would be obligated to pay the full filing fee immediately. See 28 U.S.C. § 1915(a)(3); *Celske v.Edwards, supra*, 164 F.3d at 397. A prisoner litigant is entitled to contest the district court's finding of a lack of good faith by filing a

motion in the court of appeals under Fed. R. App. P. 24(a)(5) to proceed IFP on appeal, before paying any part of the docket and filing fees. *Celske*, 164 F.3d at 398. When faced with such a motion, the statute requires us to determine whether the appeal is frivolous or otherwise in bad faith. See *Lee v. Clinton*, 209 F.3d 1025 (7th Cir. 2000).

By deciding to pay the filing fee in No.96-4010 and proceed with the appeal, Walker has forfeited his right to challenge the district court's good faith determination in that case. Walker preserved his right to assert such a challenge in No. 98-1328, but the district court's determination is unimpeachable as Walker's appeal from the district court's denial of his utterly meritless post-judgment motions is indisputably frivolous. Accordingly, Walker is independently barred from proceeding IFP in the present appeals. Finfrock, on the other hand, has good grounds on which to challenge the good faith determinations in his cases. In each one, the respective district courts found that an appeal would not be in good faith because no certificate of appealability had been issued. This reason is not enough to explain why the appeal on the merits would not be in good faith, because the standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding. *Moore v. Pemberton*, 110 F.3d 22, 24 (7th Cir. 1997). See also *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (noting that the standard for obtaining a certificate of probable cause, the predecessor to the certificate of appealability, is higher than the one used to evaluate good faith

under 28 U.S.C. § 1915); *Pate v. Stevens*, 163 F.3d 437, 439 (7th Cir. 1998) (citing *Barefoot* and warning district courts not to apply an inappropriately high standard in making good faith determinations). To issue a certificate of appealability, a court must find that the petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Williams v. Parke*, 133 F.3d 971, 975 (7th Cir. 1997). In contrast, to determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit. *Lee*, 209 F.3d at 1026. By conflating the standard for issuing a certificate of appealability and the standard for determining whether an appeal is in good faith, the district courts in Finfrock's cases erred in determining that his appeals were not in good faith. Thus, the question whether his cases belong under the PLRA is properly before us.

But what about Walker? That Walker is not eligible for IFP status regardless of whether the PLRA applies raises the question whether he may challenge the applicability of the PLRA to his habeas corpus action. If the only thing the PLRA did was establish a system for the payment of docketing fees, then we would be compelled to find that he could not bring such a challenge. The PLRA, however, does more than this. It also establishes a bar for future entitlement to IFP treatment in the so-called "three strikes" rule of 28 U.S.C. § 1915(g). The bar applies to prisoners who, while incarcerated, have, on at least three prior occasions, "brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim on which relief

may be granted." If the present actions Walker has filed belong under the PLRA, then he risks accumulating not one but two "strikes" for purposes of § 1915(g), because we have held that the filing of a complaint and the pursuit of an appeal count as separate "strikes" for this purpose. *Newlin*, 123 F.3d at 433. Even though Walker did not spell out this particular consequence of the PLRA until his reply brief, we are satisfied that his argument in the opening brief that the PLRA in its entirety does not apply to habeas corpus actions was sufficient to present the point to this court. Furthermore, we conclude that the detriment he would suffer if he accumulated one or two "strikes" is enough to entitle him to continue with the present action. (Although no one has raised the point, we note also that the district court never assessed the $5 district court filing fee for the § 2241 action under the PLRA's mandatory payment requirement, see § 1915(b)(1). The court did not assess the fee because the case was dismissed prior to service. If, however, the PLRA applied to the case, then this ruling was incorrect. See *Hains v. Washington*, 131 F.3d 1248, 1250 (7th Cir. 1997) (filing fees must be paid even when a case is dismissed under § 1915A). This means there is another concrete consequence for Walker from the outcome of this appeal: if the PLRA applies, then Walker owes $5 to the district court; if it does not and he was otherwise entitled at the district court stage to IFP status, he does not.)

B. Section 2241 or Section 2254?

The second preliminary question we must address is whether the system governing writs of

habeas corpus pertaining to prison disciplinary decisions must be the same for state and federal prisoners, or if differences in the applicable laws lead to somewhat different procedures. Congress enacted 28 U.S.C. § 2255 to be the vehicle for collateral attacks on convictions and sentences for federal prisoners. See, e.g., *United States v. Hayman*, 342 U.S. 205 (1952) (discussing § 2255); *Valona v. United States, supra*, 138 F.3d at 694 (distinguishing § 2255 and § 2241 actions). The specific focus of the statutory language on the original judgment and sentence had led courts to find that challenges brought by federal prisoners that implicate the fact or duration of confinement but do not stem from the original conviction or sentence can be brought only under 28 U.S.C. § 2241,the general habeas corpus statute. See, e.g., *Valona*, 138 F.3d at 694. In contrast to § 2255, the language of § 2254, the statute entitling state prisoners to seek federal habeas corpus relief, is considerably broader. Section 2254 refers generally to an application "in behalf of a person in custody pursuant to the judgment of a State court. . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The focus is on the fact of custody, not necessarily on flaws in the underlying judgment or sentence that brought the person there (though allegations of those kinds of problems can and do support a petition under § 2254).

In our view, the difference in language between § 2255 and § 2254, coupled with the Supreme Court's guidance in *Felker v. Turpin*, 518 U.S. 651 (1996), leads to a different path for federal

and state prisoners. A state prisoner, like Finfrock, has available a statute that in effect implements the general grant of habeas corpus authority found in § 2241, as long as the person is in custody pursuant to the judgment of a state court, and not in state custody for some other reason, such as pre-conviction custody, custody awaiting extradition, or other forms of custody that are possible without a conviction. In the latter cases, the Great Writ protected by the Constitution, Article I, Section 9, Clause 2, and § 2241 (to the extent these may be different) remain available. Even though § 2254 does not contain exclusivity language along the lines of § 2244(a) and § 2255 ¶ 5 (which together make it clear that a federal prisoner who wishes to challenge the legality of his or her conviction or sentence can proceed only under § 2255), as a practical matter the requirements of § 2254 must be met by all state prisoners filing petitions for writs of habeas corpus after conviction. As the Supreme Court put it in *Felker*, a court's "authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a State court." 518 U.S. at 662. The *Felker* decision observed that certain requirements of § 2254 and related laws, such as the need to obtain the approval of the court of appeals before filing a successive application in the district court, see 28 U.S.C. § 2244(b)(3)(A), did not apply to collateral attacks begun in the Supreme Court. But those kinds of qualifications to one side, *Felker* leads to the conclusion that when a prisoner begins in the district court, § 2254 and all associated statutory requirements apply no matter what statutory label

the prisoner has given the case. (Roughly speaking, this makes § 2254 the exclusive vehicle for prisoners in custody pursuant to a state court judgment who wish to challenge anything affecting that custody, because it makes clear that bringing an action under § 2241 will not permit the prisoner toevade the requirements of § 2254.) Indeed, we have held in numerous cases that § 2254 was the correct vehicle for contesting loss of good time credit in prison disciplinary proceedings, and we adhere to those decisions today. *E.g., McPherson v. McBride*, 188 F.3d 784 (7th Cir. 1999); *Meeks v. McBride*, 81 F.3d 717 (7th Cir. 1996). That is what Finfrock did in his case, and we agree that this was the correct route to follow.

III

We come then to the central question before us: whether the requirements of the PLRA apply to a habeas corpus action filed by a federal prisoner under § 2241 or by a state prisoner under § 2254 that is not related to the underlying criminal judgment or sentence--that is not, as *Newlin* put it, a functional continuation of the criminal prosecution. For the reasons that follow, we conclude that cases properly brought under §§ 2241 or 2254 as habeas corpus petitions are not subject to the PLRA. In so doing, we bring this circuit into line with all of our sister circuits who have ruled on the matter. See, in particular, *Davis v. Fechtel, supra*, 150 F.3d at 488-90; *McIntosh v. United States Parole Commission*, *supra*, 115 F.3d at 811-12; and *Blair-Bey v. Quick*, *supra*, 151 F.3d at 1039-41. We take this action not simply for the sake of ending our status as an outlier;

conformity for its own sake is neither necessary nor desirable for the courts of appeals, because differences in opinion have the effect of ventilating important legal questions and creating a background against which the Supreme Court can ultimately resolve an issue for the country as a whole. Still, we respect the views of our sister circuits, and we always proceed carefully when we find ourselves about to create a conflict in the circuits. That is the purpose of Seventh Circuit Local Rule 40(e), under which the court does not create a new conflict without consulting all active judges. The same approach is in order when a persistent conflict among the circuits exists, and we find ourselves in a minority of one. In the present case, experience across the country since *Newlin* was decided has convinced us that the distinction proposed in *Newlin*, between habeas corpus petitions that relate to the original criminal prosecution and those that do not, for purposes of the PLRA, is not consistent with the Supreme Court's decisions in this area, is in tension with the distinct statutory systems Congress has created for habeas corpus actions and other civil actions, and is confusing for the district courts to administer. We therefore hold that if a case is properly filed as an action under 28 U.S.C. §§ 2241, 2254, or 2255, it is not a "civil action" to which the PLRA applies.[4]

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[4] We emphasize that the action must be a proper habeas corpus action. Our ruling is not intended in any way to suggest that the district courts should not look beyond the label the petitioner attaches to his pleading to ensure that the proper procedural regime is followed. See generally *Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir. 1999) (discussing when habeas corpus is appropriate and whether a mislabeled action should be converted or dismissed).

In coming to this conclusion, we begin with the Supreme Court's 1973 decision in *Preiser v. Rodriguez, supra*, which remains the leading case establishing the proposition that prisoners may not bring civil rights actions in federal court to challenge the fact or duration of their confinement. The underlying facts of the case are especially instructive for our situation. It involved claims brought by three different state prisoners, each of whom was deprived of good-conduct-time credits by the New York State Department of Correctional Services. Respondent Rodriguez was serving a sentence for perjury and attempted larceny. While in prison, he was charged in two separate disciplinary action reports with possession of contraband material in his cell; after a hearing, he was punished with the cancellation of 120 days' good-conduct-time credits. 411 U.S. at 477-78. Respondent Katzoff was imprisoned after being convicted of possession of a dangerous weapon. He was disciplined for making derogatory comments about prison officials in his diary, and was punished with the deprivation of 30 days' good-conduct time (in addition to being required to serve 57 days in segregation, which indirectly led to the loss of another 20 days' good-conduct time). *Id.* at 480. As the Supreme Court noted, respondent Kritsky's case was similar. He was serving a state court sentence for armed robbery, and while in prison, he was charged with being a leader in a prison-wide protest demonstration and with advocating insurrection during that demonstration. For this, the warden punished him with the loss of 545 days' good-conduct-time credits and confined him in segregation

for four-and-a-half months, which led to the loss of another 45 days' good-conduct time. *Id.* at 481.

Against this factual backdrop, the *en banc* Second Circuit held that the prisoner complaints could be heard either as habeas corpus petitions or under the Civil Rights Act. *Id.* at 482. The Supreme Court granted certiorari in order, as it said,

> to consider the bearing of the *Wilwording* [*v. Swenson*, 404 U.S. 249 (1971)] decision upon the situation before us--where state prisoners have challenged the actual duration of their confinement on the ground that they have been unconstitutionally deprived of good-conduct-time credits, and where restoration of those credits would result in their immediate release from prison or in shortening the length of their confinement.

Id. The Court conducted a thorough examination of the writ of habeas corpus, and more particularly of §§ 2241 and 2254. In so doing, it noted that "the use of habeas corpus to secure release from unlawful physical confinement, *whether judicially imposed or not*, was thus [by the time of the independence of the American colonies] an integral part of our common-law heritage." *Id.* at 485 (emphasis added). In its discussion, the Court equated challenges on the ground that the statute under which the prisoner was convicted was unconstitutional, that trial was held on a defective indictment, that the person was confined in the wrong institution, that he was denied constitutional rights at trial, that his guilty plea was invalid, that he is being unlawfully detained by the

Executive or the military, and that parole was unlawfully revoked. *Id.* at 486. It concluded by holding that "the respondents' suits in the District Court fell squarely within this traditional scope of habeas corpus." *Id.* at 487. Lest there be any question, the Court underscored the fact that habeas corpus was the sole vehicle available to the prisoners, whether restoration of the good-conduct-time credits would result in immediate release or would only shorten the length of their confinement. *Id.*

Preiser, therefore, drew no distinction between habeas corpus petitions that were based on flaws in the original criminal prosecution and those that were based on claims relating to prison discipline. To the contrary, the Court went out of its way to stress that all claims relating to the fact or duration of confinement fell within the proper scope of the habeas corpus statutes. The Court's more recent decision in *Edwards v. Balisok, supra*, reinforces this point.

In *Balisok*, the Court considered the question whether the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), under which a state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if a judgment in favor of the plaintiff would necessarily imply the invalidity of his criminal conviction or sentence, should be extended to claims for damages brought by prisoners who were challenging the validity of the procedures used to deprive them of good-time credits. 520 U.S. at 643. Balisok sued under § 1983 after he was found guilty of four infractions of prison rules and sentenced to 10 days in isolation, 20 days in segregation, and the loss of 30

days' good-time credits. *Id.* at 643-44. Taking *Preiser* into account, Balisok was careful not to request restoration of his good-time credits; he asked instead only for a declaration that the procedures used by the state officials violated due process, for damages, and for an injunction preventing future violations. Notwithstanding those limitations, the Supreme Court held that the *Heck* rule applied to his case. It observed that the principal procedural defect about which Balisok was complaining--that he was denied the opportunity to present witnesses who possessed exculpatory evidence--would, if proven, necessarily imply the invalidity of the deprivation of good-time credits. *Id.* at 646-47. There is not a hint in the Court's opinion that Balisok's habeas corpus action would call for different treatment from the comparable actions brought under *Heck*; quite to the contrary, the entire thrust of the opinion is that there is no legally important difference between the two uses of habeas corpus.

The *Newlin* opinion did not consider the effect of *Preiser* on the rule it adopted. Instead, it cited only the Court's decision in *United States v. Addonizio*, 442 U.S. 178 (1979), for the proposition that "[c]omplaints about denial of parole, revocation of parole, and the like, do not affect the validity of the criminal sentence, and this litigation therefore cannot be called a functional continuation of the criminal prosecution." 123 F.3d at 438. *Addonizio*, however, held only that allegations by three federal prisoners that a postsentencing change in the policies of the United States Parole Commission, which had prolonged their actual imprisonment beyond the period intended by the sentencing judge,

would not support a collateral attack on the original sentence under 28 U.S.C. § 2255. It explained its ruling as follows:

> The claimed error here--that the judge was incorrect in his assumptions about the future course of parole proceedings--does not meet any of the established standards of collateral attack. There is no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the "fundamental" character that renders the entire proceeding irregular and invalid.

442 U.S. at 186. Bearing in mind that § 2255 is available to federal prisoners only for attacks on the underlying conviction and sentence, see *United States v. Hayman, supra*, and that the *Addonizio* Court said nothing about the prospects for an action under § 2241, at the most *Addonizio* reaffirms certain limits on the use of § 2255. Finally, to the extent the *Newlin* decision legitimately inferred from *Addonizio* a recognition by the Supreme Court that attacks on the original conviction and sentence are different from those on parole proceedings, we think that the Supreme Court's later decision in *Balisok* made it clear that *Addonizio* did not go that far, and that the *Preiser* rule establishing uniform habeas corpus rules for all challenges to the fact or duration of confinement remained the law.

We see no need to lengthen this opinion by reviewing in detail the reasons that our nine sister circuits have given for coming to the conclusion that

the PLRA does not apply to petitions for a writ of habeas corpus and other collateral relief. Briefly, however, the analysis is as follows. Even though habeas corpus petitions are technically "civil actions," if one is compelled to divide the universe of cases into only the two categories of civil and criminal, both we and our sister circuits have recognized the reality that habeas corpus petitions are a group unto themselves. See, *e.g.*, *Martin v. United States*, 96 F.3d 853, 855 (7th Cir. 1996) ("habeas corpus is more accurately regarded as being sui generis"); *Blair-Bey*, 151 F.3d at 1040; *Smith v. Angelone, supra*, 111 F.3d at 1129-30. The precise question of statutory construction is therefore whether habeas corpus petitions were considered by Congress to be the kind of "civil action" to which the provisions of the PLRA should apply. Even under the rule of *Newlin*, the answer was not a clear-cut "yes." Instead, according to *Newlin*, habeas corpus petitions that related to the original criminal proceeding were not "civil actions," and petitions that were independent of that proceeding were. But the petition itself, under *Preiser* and *Balisok*, is the same animal, regardless of the grounds the detained person is advancing in it. In addition, other courts have reviewed carefully the legislative history of both the PLRA and AEDPA and have concluded that it supports a clear line between civil actions attacking conditions of confinement (subject to the PLRA) and habeas corpus petitions attacking the fact or duration of confinement (subject to the rules governing habeas corpus). See, *e.g.*, *Blair-Bey*, 151 F.3d at 1040-41; *Reyes v. Keane, supra*, 90 F.3d at 678; *Smith*, 111 F.3d at 1130-31; *Martin v. Bissonette, supra*, 118 F.3d at 874. Finally, as the

District of Columbia Circuit commented in *Blair-Bey*, "Treating one subset of habeas petitions as 'civil actions' for PLRA purposes would also have the effect of subjecting those petitions to two separate regimes designed to deter repeat plaintiffs—with anomalous results, given the nature of the two regimes." 151 F.3d at 1041. For instance, that court pointed out, AEDPA handles the problem of repeat filers through the requirement that inmates seeking to file second or successive petitions for a writ of habeas corpus must obtain the permission of the court of appeals, in 28 U.S.C. § 2244. The PLRA, in contrast, handles the problem of repetitive filers through the "three strikes" rule discussed earlier in this opinion. See 28 U.S.C. § 1915(g). To summarize, the unique status of habeas corpus petitions, the legislative history of the PLRA and AEDPA, and the administrative problems of attempting to apply both regimes to the same set of cases all point in the direction of the conclusion we reach here.

IV

We must also decide whether the requirement of a certificate of appealability applies to habeas corpus actions based on prison disciplinary proceedings filed by state prisoners (like Finfrock) under 28 U.S.C. § 2254. The district judges considering Finfrock's cases assumed that it did, and they each denied CAs in the cases before them. That assumption, however, requires examination.

The literal language of 28 U.S.C. § 2253(c)(1)(A) would lead to the conclusion that the requirement does not apply, because the statute

expressly imposes the CA requirement on appeals where the challenged detention "arises out of process issued by a State court." When a prisoner loses good-time credits after a prison disciplinary proceeding, the resulting detention does not arise out of process issued by a state court. In *Sylvester v. Hanks*, 140 F.3d 713 (7th Cir. 1998), this court flagged the question whether the CA requirement applied in these circumstances, but did not resolve it. *Id.* at 714. In other decisions, courts have assumed without further analysis that the CA requirement does apply. See, *e.g.*, *Post v. Gilmore*, 111 F.3d 556 (7th Cir. 1997) (per curiam); *Hogan v. Zavaras*, 93 F.3d 711 (10th Cir. 1996).

In light of the statutory language, we do not see how we can construe the words "process issued by a State court" to mean "process not issued by a State court, but instead the outcome of an internal prison disciplinary proceeding." It is indisputable that prison disciplinary proceedings are far more informal than court proceedings; rules of evidence do not apply in the former; evidentiary standards are looser; and in general (undoubtedly for good reasons) they operate more flexibly. We note as well that states differ in the extent to which the results of prison disciplinary proceedings may be reviewable in the state courts. In some states, a prisoner challenging a disciplinary sanction may seek recourse in state court after he or she has exhausted available administrative remedies. For two methods, see *Peckham v. Krenke*, 601 N.W.2d 287 (Wis. Ct. App. 1999) (certiorari review available), and *South v. Franzen*, 413 N.E.2d 523 (Ill. App. Ct. 1980) (habeas corpus review available). In others, like Indiana, the

administrative proceeding is the end of the line. See *Hasty v. Broglin*, 531 N.E.2d 200 (Ind. 1988) (no judicial review available). In those states in which review is possible, it is far from plenary. See *Peckham*, 601 N.W.2d at 290 (factual determinations are conclusive if supported by "any reasonable view of the evidence"); *South*, 413 N.E.2d at 525 (judicial review is deferential and limited to determining whether a prisoner's constitutional rights have been violated). The possibility of limited judicial review does not, in our view, convert the prisoner's administrative detention into something that arises from process issued by the state court. Rather, it arises from the prison disciplinary proceeding and receives limited review by the state court. In states like Indiana, the state court never becomes involved at all.

There is good reason to accord greater finality to state court proceedings, where the full range of procedural protections for a defendant apply, than to prison disciplinary proceedings. And even if there would be equally compelling reasons to write the statute to cover both detentions arising from process issued by a state court and process issued in connection with an internal prison disciplinary proceeding, this is not what Congress did. If it was an oversight, it is one that can easily be corrected in amendatory legislation. But until then, we see no statutory authorization for imposing the CA requirement on appeals in which the complained of detention does not arise from process issued by a state court. We note that this conclusion does no more than maintain a certain consistency between the procedures applicable to state prisoners and

those applicable to federal prisoners, because it is now well established that the CA requirement does not apply to appeals in § 2241 cases. *Bush v. Pitzer*, 133 F.3d 455, 456 (7th Cir. 1997); *Murphy v. United States*, 199 F.3d 599, 601 n.2 (2d Cir. 1999) (listing cases). Administration of this rule will be straightforward for the district courts: they need only ascertain the source of the detention (state court process or something else), and the need or not for a CA will be apparent.[5] We therefore hold that Finfrock may proceed with his appeals despite the district courts' decisions to deny the CAs.

In so holding, we recognize that the regime governing certificates of appealability will reflect precisely the distinction between actions relating to the original criminal proceeding and those relating to disciplinary proceedings (or other sources of detention) that we have rejected in Part III of this opinion for purposes of the PLRA. We believe that any tension that may result between the two holdings is, however, more apparent than real. In Part III we addressed the question whether habeas

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[5] Likewise, the clerk of the district court, who administers the collection of filing fees, is directed to stop using the procedure outlined in 28 U.S.C. § 1915(b)(2) to collect unpaid portions of filing fees owed by prisoners in habeas corpus actions. Requests by prisoners for refunds of their appellate fees, however, will not be entertained since "every litigant has the legal responsibility to pay the filing and docketing fees to the extent feasible." *Longbehn v. United States*, 169 F.3d 1082, 1083 (7th Cir.1999). A court has it within its discretion to insist that litigants proceeding IFP in non-PLRA cases must nonetheless pay a fee commensurate with their ability to do so. *Id.* at 1083-84. And it seems to us clear that, by definition, a prisoner was able to pay anything that he or she has already paid

corpus actions should or should not be considered as "civil actions" and thus come under the gate-keeping rules of the PLRA. We decided that Supreme Court precedents, the nature of the special gate-keeping rules that Congress has established for habeas corpus actions, the reasoning of our sister circuits, and the desirability of eliminating a conflict on such a technical matter all lead to the conclusion that for this purpose no distinction should be drawn between different types of habeas corpus actions. Part IV turned to the internal management of habeas corpus actions. On the federal side, as we noted, different statutes govern challenges to a prisoner's original conviction and other challenges to custody: 28 U.S.C. § 2255 for the former, 28 U.S.C. § 2241 for the latter. For these cases, Congress has stipulated that the CA requirement applies only to § 2255 cases. For state prisoners, the governing law is § 2254. We have concluded that the plain language of 28 U.S.C. § 2253(c)(1)(A) requires us to follow rules for CAs in § 2254 cases that mirror the rules applicable to federal prisoners. This should not be difficult for the district courts to administer, particularly given the experience they already have in distinguishing between § 2255 and § 2241 cases. Furthermore, the fact that the source of detention matters for the internal management of habeas corpus actions does not compel the conclusion (in the face of the precedents we have discussed in Part III) that the source of detention matters when we are deciding whether habeas corpus actions in general are the kind of "civil action" addressed by the PLRA. As we noted before, this is nothing but a conclusion on our part about the way various statutes should be interpreted. It is therefore amenable to legislative

adjustment or correction, if Congress believes a different or better system should be implemented. At present, however, it is the system we have and the one the courts must follow.

V

Before setting forth our dispositions of the two cases before us, we summarize briefly the holdings in this case, in the hopes that this will assist both the district courts and counsel in their administration of this complex area of the law. In Part II of this opinion, we conclude that state prisoners who are challenging the results of prison disciplinary proceedings must proceed under 28 U.S.C. § 2254, not 28 U.S.C. § 2241.[6] Part III of this opinion holds that the requirements of the PLRA do not apply to properly characterized habeas corpus actions, whether they are brought under §§ 2241, 2254, or 2255, because those actions are not "civil actions" within the meaning of the PLRA. Last, Part IV holds that the requirement of a CA imposed by 28 U.S.C. § 2253(c)(1)(A) does not apply to a state prisoner's

[6] We recognize that this conclusion might be thought to conflict with the decision of the Tenth Circuit in *Montez v. McKinna*, 208 F.3d 862 (10th Cir. 2000). The *Montez* court held that state prisoners who are challenging the execution of their sentence must use 28 U.S.C. § 2241, in the context of a challenge to a decision by Wyoming prison authorities to move the plaintiff from a state operated prison in Wyoming to a privately operated facility in Texas and from the Texas facility to a private Colorado facility. It also held that state prisoners were required to obtain a CA in order to appeal such a case. That decision, of course, dealt directly with the way the state authorities chose to implement a particular sentence, rather than with the adjudication of a particular dispute that affected the length of incarceration. *Montez* therefore may be distinguishable in any event from our case, but we note the potential conflict because of the breadth of some of the language the court used.

action under § 2254 that challenges the result of a prison disciplinary hearing, because the specific (additional) detention that is the focus of such a challenge does not arise out of "process issued by a State court." With these principles in mind, we turn once again to the two cases on appeal.

A. Walker v. O'Brien

In Walker's two cases, the dispute about the underlying merits of his obligation to pay for the damaged door has been resolved and he no longer challenges any other aspects of the district court's rulings. However, the dispute over his obligation to make payments to the court remained to be determined here, and we have concluded that the PLRA does not apply to his cases. This conclusion means that neither the initial filing of this action nor the filing of the appeals may count as a "strike" for purposes of § 1915(g). Nevertheless, both our conclusion about the right of the court to insist on some payment of fees wholly apart from the PLRA, and Walker's own failure, in No. 96-4010, properly to contest the district court's finding of a lack of good faith means that his request for a refund of the $105 he paid in that appeal must be rejected. Our finding that the PLRA does not apply also means that neither this court nor the district court is required to take steps to collect the filing fees Walker has not paid. Now that all outstanding issues in Walker's cases have been resolved, the appeals in Nos. 96-4010 and 98-1328 are DISMISSED.

B. Finfrock v. Hanks

In Finfrock's five cases, the fact that the PLRA does not apply means that Finfrock is entitled to seek IFP status despite having three "strikes" under 28 U.S.C. §1915(g), and that if IFP is granted he will not be subject to the PLRA's fee assessment and collection mechanism. Moreover, in light of our conclusion that the CA requirement does not apply to habeas corpus actions challenging prison disciplinary decisions, Finfrock may pursue appeals in his cases without obtaining a CA. Because the district courts in Finfrock's cases applied the wrong standard in determining whether his appeals were taken in good faith, however, cases No. 97-3792, 97-3797, 97-3798, 97-3799, and 97-3800 are REMANDED to those courts so that they can apply the correct standard and make an initial decision whether Finfrock may proceed IFP on appeal.

Easterbrook, *Circuit Judge*, with whom Posner, *Chief Judge*, and Manion, *Circuit Judge*, join, dissenting from the denial of rehearing en banc.

The panel announces two important decisions: that collateral attacks on prison discipline are not "civil actions" for the purpose of the Prison Litigation Reform Act (Part III); and that state prisoners who want to appeal adverse decisions in cases about good-time credits do not need certificates of appealability, despite 28 U.S.C. §2253(c), part of the Antiterrorism and Effective Death Penalty Act (Part IV). We

should consider these issues en banc, for several reasons.

- The panel has established ground rules for a substantial body of prisoners' suits, easily more than a hundred annually in this circuit.
- The issues are important qualitatively as well as quantitatively. When must prisoners pay to litigate? May decisions rejecting frivolous collateral attacks be appealed as of right?
- Part III of the panel's opinion overrules Part III of *Newlin v. Helman*, 123 F.3d 429, 437-38 (7th Cir. 1997), while Part IV creates a conflict among the circuits.
- The panel's opinion is internally contradictory. (i) Part II.b holds that collateral attacks about good-time credits concern "a person in custody pursuant to the judgment of a State court" (§2254(a)), yet Part IV holds that these same collateral attacks do not concern a "proceeding in which the detention complained of arises out of process issued by a State court" (§2253(c)(1)(A)). (ii) Part III is justified in large measure by the desirability of eliminating a conflict among the circuits, yet Part IV creates a new conflict. (iii) The panel asserts in Part III that it is too difficult to distinguish between collateral attacks on convictions and collateral attacks on prison discipline when assessing fees, yet Part IV draws exactly this line for purposes of certificates of appealability.

(iv) Part IV invokes a plain-meaning approach to interpretation, while Part III disdains the statutory text.

- Both of the panel's principal holdings are substantively questionable, for reasons that I now set out.

Part III holds that the PLRA's fee-collection mechanism (indeed, the whole PLRA) does not apply to any application for collateral relief. The critical text is 28 U.S.C. §1915(b)(1), which says that "if a prisoner brings a civil action or files an appeal in forma pauperis" then part of the filing fee must be prepaid, and the rest must be collected over time from prison trust accounts. Other features of the PLRA also apply only to "civil actions." Is a petition for a writ of habeas corpus a "civil action"? We have been told authoritatively that the answer is "yes." *Browder v. Director, Department of Corrections*, 434 U.S. 257, 269 (1978); *United States v. Morgan*, 346 U.S. 502, 505 & n.4 (1954). Is an appeal from the denial of a petition for collateral relief an "appeal in forma pauperis"? Surely yes, when the prisoner seeks to proceed in forma pauperis. What could an appeal in forma pauperis be, other than "an appeal in forma pauperis"?

Collateral attacks are civil actions. *Browder* holds this (the Court wrote that "[i]t is well settled that habeas corpus is a civil proceeding"), and if that were not enough 28 U.S.C. §1914(a) demonstrates it: "The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $150, except that

on application for a writ of habeas corpus the filing fee shall be $5." Prison discipline and ensuing collateral attacks are not criminal prosecutions, so they must be "civil actions." See *Wolff v. McDonnell*, 418 U.S. 539,556 (1974) (remarking, in a case involving good-time credits, that "[p]rison disciplinary proceedings are not part of a criminal prosecution"); *Baxter v. Palmigiano*, 425 U.S. 308 (1976). If we define the phrase "civil action" in §1915(b) the way Congress did in §1914(a), a statute treating collateral attacks as a subset of all civil actions, then application of the PLRA follows directly.

Lawsuits arising out of prison discipline are a principal target of the PLRA. Should it make any difference for this purpose whether a warden revokes 30 days of good-time credits or puts the prisoner in segregation for six months (which also may prevent the prisoner from earning new good-time credits)? Not under the language of §1915(b), and not for functional purposes either, yet under Part III of the panel's opinion the warden's choice of sanction determines whether the prisoner must prepay partial filing fees and whether prior frivolous suits require prepayment of the full filing fees, as §1915(g) requires. (Because §1915(g) treats any frivolous proceeding as a "strike," I take it that even under the panel's approach three frivolous collateral attacks would require prepayment of the filing fees in any future "civil action or appeal [of] a judgment in a civil action".)

Part III of the panel's opinion does not take the language of §1915(b) seriously; it mentions the

phrase "civil action" only in passing and the phrase "appeal in forma pauperis" not at all. The panel conceives the issue as whether a collateral attack arising out of the deprivation of good-time credits differs, for purposes of §2254, from a collateral attack arising out of a conviction or sentence. Relying on cases such as *Preiser* and *Balisok*, the panel answers "no." I agree with that answer--but it is an answer to an irrelevant question, for we must decipher the meaning of "civil action" in §1915(b) rather than the nature of actions under §2254. Nothing in *Preiser* or *Balisok* concerns the meaning of "civil action . . . in forma pauperis" or "appeal in forma pauperis" in §1915(b); we have to define these ourselves rather than attribute a definition to cases concerning other issues.

To understand why Part III of *Newlin* held that collateral attacks on prison discipline are "civil actions" under §1915(b), one must begin with *Martin v. United States*, 96 F.3d 853 (7thCir. 1996). *Martin* allowed that petitions for habeas corpus "are technically civil proceedings and so come within the literal scope of the Act." 96 F.3d at 855. But *Martin* also observed that changes made by the AEDPA contemporaneously with the PLRA subject applications for writs of habeas corpus to a special regimen. For example, under the PLRA three frivolous suits block further civil filings and appeals in forma pauperis, §1915(g), while the AEDPA limits second or successive filings via §2244(b). As the panel wrote in *Martin*, 96 F.3d at 856, "by drastically curtailing the filing of second or successive applications of [sic] habeas corpus, the antiterrorism law addressed in the context of habeas corpus the

same concern with groundless litigation that informs the Prison Litigation Reform Act and tailored its response to that context." Because the principal office of §2254 and §2255 is "to upend a criminal judgment" (96 F.3d at 855), *Martin* concluded that collateral attacks on criminal convictions and sentences should be grouped with criminal rather than civil proceedings for the purpose of §1915(b) and (g). In other words, *Martin* holds that collateral attacks should be treated the same way as the judgment being contested.

But prison discipline is not a criminal proceeding; *Wolff* and *Baxter* hold that it is civil in nature, and that norms of the criminal process (such as the right to counsel) do not apply. If under *Martin* a collateral attack is treated (so far as the PLRA is concerned) as a continuation of the decision being challenged, then a collateral attack on prison discipline is civil rather than criminal. Part III of *Newlin* so holds, which means that petitions for habeas corpus arising from prison discipline are "civil actions" for purposes of §1915(b), just as they are for purposes of §1914(a), Fed. R. App. P. 4(a), and many other statutes and rules.

Part III of the panel's opinion does not come to grips with the language of the PLRA, the reasons *Martin* read that language non-literally, and the reasons *Newlin* gave for declining to extend the non-literal reading to other uses of habeas corpus. Nonetheless, I am content with the outcome of Part III (rather, would be content if the panel applied the same approach to Part IV). That other circuits have followed *Martin* to the limit is important--we should

get rid of procedural conflicts to the extent we can do so with intellectual honesty, see *Lee v. Clinton*,209 F.3d 1025 (7th Cir. 2000); *United States v. Hill*, 48 F.3d 228, 231-32 (7th Cir. 1995)—and the line between *Martin* and *Newlin* can be elusive. Handling claims and collections under the PLRA has not been easy, and stubborn adherence to a complicating factor that has not won support elsewhere has little to commend it. Except for the fact that Part IV of the panel's opinion reintroduces this very complication, creating a new conflict among the circuits in the process!

Part IV holds that state prisoners who want to appeal adverse decisions in cases about good-time credits do not need certificates of appealability. Only prisoners seeking to appeal from the rejection of challenges to their convictions or sentences need certificates of appealability, the panel concludes. This distinction between challenges to convictions and challenges to prison discipline is exactly the line drawn (for purposes of §1915) by *Newlin*,and overruled by Part III of the panel's opinion as both unprincipled (given *Preiser* and *Balisok*) and too difficult to implement. If this line is incompatible with Higher Authority and causes administrative headaches, and therefore is a Bad Thing in Part III, it is still a Bad Thing when we arrive at Part IV.

When statutes leave no leeway, we must tolerate Bad Things. This is the claim of Part IV: that the statute leaves no room for maneuver. A state prisoner needs a certificate of appealability only when appealing from "the final order in a habeas corpus proceeding in which the detention

complained of arises out of process issued by a State court". 28 U.S.C. §2253(c)(1)(A). See also Fed. R. App. P. 22(b)(1). A prisoner who contests the deprivation of good-time credits is complaining about an administrative rather than a judicial decision. The panel remarks (slip op.20): "In light of the statutory language, we do not see how we can construe the words 'process issued by a State court' to mean 'process not issued by a State court, but instead the outcome of an internal prison disciplinary proceeding.'" Claiming to act under the compulsion of plain statutory language, the panel disagrees with other circuits, which have held that state prisoners need certificates of appealability to obtain review of any decision under §2254. See, *e.g.*, *Montez v. McKinna*, 208 F.3d 862, 866-69 (10th Cir. 2000); *Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997). Section 2253(c)(1)(A) descends from §2253 ¶3 (1994 ed.), which required prisoners to obtain "certificates of probable cause" to appeal, and courts considering the question uniformly have held or assumed that prisoners who sought restoration of good-time credits needed certificates of probable cause. See, *e.g.*, *Crowell v. Walsh*, 151 F.3d 1050 (D.C. Cir. 1998); *Lemieux v. Kirby*, 931 F.2d 1391 (10th Cir. 1991). All of the Justices who wrote or joined opinions in *Davis v. Jacobs*, 454 U.S. 911 (1981), assumed that this is so. And the D.C. Circuit, at least, has linked the definition of "civil action" under §1915(b) to the need for a certificate of appealability (or probable cause) under §2253. It held in *Crowell* and *Blair-Bey v. Quick*, 151 F.3d 1036 (D.C. Cir. 1998), that when application of §1915(b) is excused in a collateral attack, application of §2253(c) is essential. Our panel approves *Blair-*

Bey (slip op. 3) yet ignores *Crowell*, though these companion opinions represent two sides of the same coin.

The panel does not cite, and I could not find, any appellate decision holding that a state prisoner does not need a certificate of appealability (or did not need a certificate of probable cause) to appeal from the denial of a request for post-conviction collateral relief. The panel's assertion, slip op. 21, that "it is now well established that the CA requirement does not apply to appeals in §2241 cases" is not correct. The cases cited for this proposition, *Bush v. Pitzer*, 133 F.3d 455, 456 (7th Cir. 1997), and *Murphy v. United States*, 199 F.3d 599, 601 n.2 (2d Cir. 1999), address collateral attacks by federal prisoners. Section 2253(c)(1)(A) is limited to state prisoners' collateral attacks; it is §2253(c)(1)(B), not §2253(c)(1)(A), that controls federal prisoners' need for certificates of appealability, and §2253(c)(1)(B) covers only "the final order in a proceeding under §2255." After the panel's opinion, the seventh circuit becomes a minority of one in the interpretation of §2253(c)(1)(A).

If textualist interpretive methods are essential, as Part IV proclaims, then what happened in Part III? Petitions for habeas corpus "are technically civil proceedings and so come within the literal scope of the Act." *Martin*, 96 F.3d at 855, echoed at slip op. 18. A textual approach, consistently applied, would require us to overrule *Martin*, not *Newlin*, and to include all collateral attacks within the PLRA's scope. Why give a pragmatic reading to the PLRA in Part III, then

switch to textualism in Part IV? Not for pragmatic reasons; the approaches yield diametrically opposed answers to a functionally identical question.

Part IV is at war with Part II.b of the panel's opinion as well as with Part III. In Part II.b the panel holds that a petition for a writ of habeas corpus filed by a prisoner who wants good-time credits restored is covered by §2254 because it is a proceeding "in behalf of a person in custody pursuant to the judgment of a State court". 28 U.S.C. §2254(a). The panel holds that one may be "in custody pursuant to the judgment" without needing to attack that judgment. Slip op. 11-12. Just so for §2253(c). "[T]he detention complained of arises out of process issued by a State court" (emphasis added) even if the prisoner does not challenge the state court's process. If challenges to good-time credits proceed under §2254 because the words "in custody pursuant to the judgment of a State court" refer to the genesis of the custody rather than the claim made in the collateral attack, then the words "detention complained of arises out of process issued by a State court" also must refer to the genesis of the custody rather than the claim made in the collateral attack. If Part II.b is right, then Part IV is wrong.

Part II.b has it right. Finfrock's detention "arises out of process issued by a State court". He has been convicted; his conviction and sentence are essential to his custody. Revocation of good-time credits does not extend a prisoner's sentence; instead this decision (like the denial or revocation of parole, or demotion to a lower credit-earning class) requires the prisoner to serve more of the original sentence.

But the detention has been authorized by (that is, arises out of) the conviction and sentence (that is, process issued by a state court). Section 2253(c)(1)(A) deals with detention (= custody) that depends on a state-court order; it is not limited to attacks on that order. A prisoner who protests the revocation of good-time credits is appealing "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" and therefore needs a certificate of appealability. The reading offered here is the one the tenth circuit adopted in *Montez*, deeming it an inevitable rendition of the statute's language. Part IV makes a plain-language claim the other way. My colleagues and the tenth circuit thus agree on one thing: that §2253(c)(1)(A) is clear. They just don't agree on what it means, a sign that the language may not be so plain after all.

The difference between §2254(a) ("application. . . in behalf of a person in custody pursuant to the judgment of a State court") and §2253(c)(1)(A) ("proceeding in which the detention complained of arises out of process issued by a State court") is not a linguistic quirk or oversight. Prisoners may seek writs of habeas corpus before conviction--perhaps to test the validity of pretrial custody (the Great Writ, dealing with excessive detention by executive officials), perhaps to test extradition to another jurisdiction for trial. A state prisoner who applies for such a writ and does not get it needs a certificate of appealability, because he is in "detention [that] arises out of processissued by a State court". But such a prisoner has not been convicted and therefore need not satisfy §2254 or any other restriction on

actions by persons "in custody pursuant to the judgment of a State court". The distinction is both historical and sensible. Until the latter half of the twentieth century no state prisoner could obtain collateral review following conviction by a court of competent jurisdiction, and federal law still makes it difficult to wage a collateral attack on the final judgment of a state court. But §2253(c)(1)(A) is more general, applying to all whose custody can be traced to state judicial process, such as an arrest warrant or indictment. The panel supposes that §2254(a) is broader than §2253(c)(1)(A), but this is backward. Section 2253(c)(1)(A) applies before trial, in extradition cases, and after judgment too, including claims of convicts required to *serve* more of their sentences than they think they should.

Any reading of §2253(c) other than the one urged here and adopted in *Montez* produces an anomaly: a prisoner who challenges 100% of his prison time (by attacking a conviction or sentence) needs a certificate of appealability and is likely to be turned away without an appellate decision on the merits, for only a fraction of appellants make the necessary "substantial showing of the denial of a constitutional right" (§2253(c)(2)). See *Slack v. McDaniel*, 120 S. Ct. 1595 (2000). But a prisoner who challenges only 1% or 5% of his prison time is guaranteed an appellate decision on the merits. Whatever sense may lie behind this eludes me.

There isn't any uniform, or uniformly happy, solution to coverage issues under the AEDPA. Federal prisoners' collateral attacks on deprivations of good-time credits arise under §2241, so they do not

need certificates of appealability. But differences in the statute's treatment of state and federal prisoners do not justify departing from §2253(c) (1)(A), or for that matter from §1915(b), when we must decide exactly how state prisoners' petitions must be handled. These complex statutes govern hundreds of cases annually. It is worth the full court's time to ensure that the issues I have discussed are decided correctly.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 97-861-C-H/G

JOSEPH W. FINFROCK,)
Petitioner,)
v.)
CRAIG A. HANKS,)
Respondent.)

ENTRY

This cause is before the court on the petitioner's notice of appeal. This notice was timely filed in connection with the entry of final judgment in this action on the clerk's docket on September 23, 1997.

The petitioner's notice of appeal is construed as a request for the issuance of a certificate of appealability. A certificate of appealability is a jurisdictional prerequisite to an unsuccessful habeas applicant appealing the denial of relief sought pursuant to 28 U.S.C. § 2254(a). 28 U.S.C. § 2253(1)(A). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). For the reasons stated in connection with the denial of Mr. Finfrock's petition for a writ of habeas corpus, the court does not find that he will be able to make "a substantial showing of the denial of a constitutional right." Accordingly, the petitioner's

implied request for the issuance of a certificate of appealability is **denied.**

The petitioner seeks leave to proceed on appeal *in forma pauperis.* Although this is an action for habeas corpus relief, it is not a continuation of the petitioner's criminal conviction or a challenge to his conviction. Accordingly, the revisions to 28 U.S.C. § 1915(b) enacted as part of the Prison Litigation Reform Act of 1995 apply, and the petitioner must pay the appellate fees of $105.00. *Newlin v. Helman,* 1997 WL 409403 (7th Cir. July 23, 1997). He is not entitled to *in forma pauperis* status in his appeal for two reasons: first, the appeal is not taken in good faith, a conclusion the court reaches because no certificate of probable cause has been issued; and second, the petitioner is ineligible to proceed *in forma pauperis* for cases covered by the Prison Litigation Reform Act of 1995, a determination made under 28 U.S.C. § 1915(g) and explained by Judge Tinder in IP 97-1223-C-T/G. Accordingly, the petitioner's request to proceed on appeal *in forma pauperis* is **denied.**

IT IS SO ORDERED.

DAVID F. HAMILTON, Judge
United States District Court

Caption omitted (NO. IP 97-861-C-H/G)

ENTRY DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DIRECTING ENTRY OF JUDGMENT

This is an action for habeas corpus relief brought by Joseph Finfrock, an Indiana prisoner. The pleadings and expanded record show that the petitioner was disciplined in a proceeding identified as No. PCF 96-09-0111 for committing the institutional infraction of destroying, damaging or altering State property. Although Finfrock contends in this action that this sanction was imposed in derogation of his due process rights, the court finds otherwise, and hence must deny his petition for a writ of habeas corpus. This conclusion rests on the following facts and circumstances:

1. Finfrock was confined at the Plainfield Correctional Facility on September 8, 1996, and on that date a conduct report was issued charging that Finfrock had been found in the unauthorized possession of a part of a law book and that the binding of the law book had been torn apart.

2. Finfrock was "screened" on this conduct report on September 9, 1996, meaning that he was supplied with a copy of the conduct report, that he was notified of his procedural rights in connection with the anticipated hearing, that the hearing was scheduled for September 12 or 13, 1996, that he had the right to request witnesses at the hearing and that he had the right to the assistance of a lay

representative in some circumstances. Finfrock responded that he sought a lay advocate, and requested Officer Scott as a witness.

3. The hearing was held on September 13, 1996. Finfrock was presented and participated in the hearing. Officer's [sic] Scott's statement was submitted and considered, as were the conduct report and Finfrock's statement that he had possession of the material but had not taken it intentionally and that there was no damage. The hearing officer considered this evidence and found Finfrock guilty.

4. Finfrock's administrative appeal was denied, and this action followed, having been filed on May 28, 1997. Finfrock's custodian was ordered to show cause why relief should not be granted, and has done so. Finfrock has replied, and the action has been fully at issue since September 16, 1997.

5. Finfrock seeks relief in the action pursuant to 28 U.S.C. § 2254(a). He is entitled to such relief only if he is "in custody in violation of the Constitution or laws or treaties of the United States."

6. Finfrock's claims are considered in light of the special environment of a prison, where "administrators must be accorded wide-ranging deference in the . . . execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Pardo v. Hosier*, 946 F.2d 1278, 1280-81 (7th Cir. 1991) (internal quotations omitted). They must also be considered in

light of the procedural protections of *Wolff v. McDonnell,* 418 U.S. 539 (1974):

> a. Written notice of the charge against the prisoner, given at least twenty-four hours prior to the hearing.
>
> b. The right to appear in person before an impartial hearing body.
>
> c. The right to call witnesses and to present documentary evidence, when to do so will not unduly jeopardize institutional safety or correctional goals.
>
> d. A written statement of reasons for the disciplinary action taken.

See also Rasheed-Bey v. Duckworth, 969 F.2d 357, 361 (7th Cir. 1992). In addition, there is a substantive component to the issue, which requires that the decision of a conduct board be supported by "some evidence." *Superintendent v. Hill,* 472 U.S. 445 (1985). *See also Meeks v. McBride,* 81 F.3d 717, 719 (7th Cir. 1996).

7. Through his first and fourth claims, Finfrock challenges the sufficiency of the evidence. His challenge rests on (a) his claim that only the pocket part was taken and (b) the hearing officer did not physically examine the law book to ascertain that it had been damaged or destroyed. These claims are not persuasive because the conduct report was clear, was found credible by the hearing officer and showed that the law book had been damaged. Due process in

these circumstances requires only "some evidence," not that the factfinder physically inspect the evidence. Since there was some evidence that the law book had been damaged, the restitution order cannot be challenged.

8. Finfrock's second claim is that he was denied a "full conduct board," but the court finds no requirement in *Wolff* or its progeny that decision making entity be a multi-membered body.

9. Finfrock's third claim is that he was denied the assistance of a competent lay advocate. This claim fails for two reasons. First, due process does not require a lay advocate with particular skills or knowledge. Indeed, given the simplicity of the charge, given Finfrock's personal knowledge of the relevant circumstances and given his opportunity to participate in a hearing, it is doubtful that due process required *any* lay advocate. *See Miller v. Duckworth,* 963 F.2d 1002, 1004 (7th Cir. 1992) (*Wolff* contemplates the need for a lay advocate based on the inmate's illiteracy or the complexity of the case). Second, Finfrock has not alleged *prejudice* from the lack of assistance from his lay advocate. The principle of harmless error in these circumstances prevents an inference that Finfrock could be entitled to relief on this portion of his petition. *Powell v. Coughlin,* 953 F.2d 744, 749 (2d Cir. 1991); *Hayes v. Thompson,* 637 F.2d 483, 493 (7th Cir. 1980); *McCall-Bey v. Franzen,* 585 F. Supp. 1295, 1299-1300 (N.D. Ill. 1984).

10. "The touchstone of due process is protection of the individual against arbitrary action

of the government." *Wolff*, 418 U.S. at 558. There was no arbitrary action in any aspect of the order, charge, disciplinary proceeding or sanctions involved in the events identified in this action, and there was no constitutional infirmity in the proceeding which would entitle Finfrock to relief in this case. Accordingly, his petition for a writ of habeas corpus must be **denied** and his action dismissed with prejudice. Judgment consistent with this Entry shall now issue. The costs of this action are assessed against the petitioner.

IT IS SO ORDERED.

DAVID F. HAMILTON, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 97-996-C-M/S

JOSEPH W. FINFROCK,	)
	)
Petitioner,	)
v.	)
CRAIG HANKS,	)
	)
Respondent.	)

ENTRY DISCUSSING SELECTED MATTERS

The court, having reviewed the above action, now makes the following rulings:

1. The petitioner's notice of appeal is construed as his request for the issuance of a certificate of appealability.

2. A certificate of appealability is a jurisdictional prerequisite to an unsuccessful habeas applicant appealing the denial of relief sought pursuant to 28 U.S.C. § 2254(a). 28 U.S.C. § 2253(1)(A). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons stated in connection with the denial of Mr. Finfrock's petition for a writ of habeas corpus, the court finds no basis

on which to conclude that he will be able to make "a substantial showing of the denial of a constitutional right" in his appeal. Accordingly, the petitioner's implied request for the issuance of a certificate of appealability is **denied.**

3. Although this is an action for habeas corpus relief, it is not a continuation of the petitioner's criminal conviction or a challenge to his conviction. The Prison Litigation Reform Act of 1995 therefore applies to the petitioner's obligation to pay the filing fee in this case. *Newlin v. Helman,* 123 F.3d 429 (7th Cir. 1997). For two reasons, the petitioner is not entitled to proceed on appeal *in forma pauperis*: first, his appeal is not taken in good faith, *see* 28 U.S.C. § 1915(a)(1), a conclusion evident from the fact that he is not entitled to a certificate of probable cause; and second, the petitioner has "struck out" under 28 U.S.C. § 1915(g) through prior *in forma pauperis* actions which ended in dismissals on grounds of frivolousness. Accordingly, the petitioner's request to proceed on appeal *in forma pauperis* is **denied**.

IT IS SO ORDERED.

LARRY J. McKINNEY, Judge
United States District Court

Caption omitted (NO. IP 97-996-C-M/S)

ENTRY DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DIRECTING ENTRY OF JUDGMENT

This is an action for habeas corpus relief brought by Joseph Finfrock, an Indiana prisoner. The court has examined the pleadings and the expanded record, and finds for the reasons explained in this Entry that the petition must be denied and the action dismissed with prejudice. This disposition is based on the following facts and circumstances:

1. Finfrock was disciplined in two proceedings challenged in this action.

a. In No. IYC 97-02-0154, Finfrock was charged with and found guilty of threatening another with bodily harm. He was sanctioned with the loss of specified privileges (telephone and commissary) for 90 days, was placed in disciplinary segregation for 90 days and was recommended for transfer to a more secure facility.

b. In No. IYC 97-02-0155, Finfrock was charged with and found guilty of committing battery on another person. He was sanctioned with the imposition of a 3-year period in disciplinary segregation, with the loss of 167 days of earned good - time and was recommended for transfer to a more secure facility.

2. Finfrock invokes 28 U.S.C. § 2254(a) as the basis for his claims in this action. He is entitled to such relief only if he is "in custody in violation of the Constitution or laws or treaties of the United States."

3. The sanction in No. IYC 97-02-0154 did not constitution the imposition of a significant and atypical hardship in relation to the normal incidents of prison life, *Sandin v. Conner,* 115 S. Ct. 2293, 2297 (1995), and hence did not trigger even the limited due process protections which have been recognized in the context of prison disciplinary proceedings. *See Higgason v. Farley,* 83 F.3d 807 (7th Cir. 1996) ("The Due Process Clause itself does not create a right for prisoners to leave the area around their cells, to visit other prisoners, or not to be subjected to lockdowns; only the Eighth Amendment limits these restrictions.") (citing *Smith v. Shettle,* 946 F.2d 1250, 1252 (7th Cir. 1991) (holding that, subject only to the Eighth Amendment, "a state can confine a prisoner as closely as it wants, in solitary confinement if it wants; a prisoner has no natural liberty to mingle with the general prison population"); *Whitford v. Boglino,* 63 F.3d 527, 533 ("even if prisoners are entitled to due process protections before extreme terms of segregation may be imposed, Whitford's sentence of six months was not such an extreme term."). Accordingly, Finfrock is not entitled to judicial review (under the ambit of § 2254(a)) of the proceedings associated with No. IYC 97-02-0154.

4. The sanction in No. IYC 97-02-0155 included the loss of earned good time, and for this

reason Finfrock was entitled to certain due process protections before that occurred. *Meeks v. McBride,* 81 F.3d 717, 719 (7th Cir. 1996) (citing *Wolff v. McDonnell,* 418 U.S. 539, 557 (1974)). Under *Wolff,* the inmate must receive:

> (a) Advance written notice of the charges against him at least twenty-four hours before the hearing;
>
> (b) The opportunity to be heard before an impartial decisionmaker;
>
> (c) The opportunity to call witnesses and present documentary evidence in their defense when consistent with institutional safety and correctional goals; and
>
> (d) A written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.

Henderson v. United States Parole Commission, 13 F. 3d 1073, 1077 (7th Cir.), *cert. denied,* 115 S. Ct. 314 (1994). In addition, there is a substantive component to the issue, which requires that the decision of a conduct board be supported by "some evidence." *Superintendent v. Hill,* 472 U.S. 445 (1985).

5. Using *Wolff* and *Hill* as an analytical template, each of the recognized procedures were followed or afforded to Finfrock and the record contains "some evidence" of his "guilt." That is, the record shows that Finfrock received written notice of the charge more than 24 hours in advance of the

hearing, that Finfrock participated in the hearing by making a statement concerning the charge (the statement being that Sgt. Owens had stepped into Finfrock's way and bumped into Finfrock), that Finfrock was accompanied at the hearing by a lay advocate, that statements from the witnesses Finfrock had requested were produced and considered, that the hearing officer made a written finding and a summary of the evidence relied on in making its decision and that the hearing officer gave a written statement of the reasons supporting the sanction which was imposed. The evidence of Finfrock's guilt of the infraction consisted in the description in the conduct report that Finfrock committed battery on Sgt. Owens by pushing against Owens' chest while Finfrock was trying to exit the walkway on which the two were located. This occurred at approximately 2:30 p.m. on February 20, 1997, at the Indiana Youth Center, and after Finfrock had been ordered twice to move from the walkway into his assigned cell. Finfrock's contrary claims rest on either factual arguments which the record refutes (and which must be accepted for the purpose of the present habeas review), or on legal claims which find no support in *Wolff* and its progeny. Specifically, there is nothing to show that the hearing officer did not impartially perform his duties, there is no due process right to a multi-member board for making the decision, the alleged failure to follow Indiana prison regulations concerning Finfrock's pre-hearing segregation does not warrant relief under § 2254(a), and there is no showing that a lay advocate was required or that the performance of Finfrock's lay advocate rendered the proceeding unfair.

6. "We should not be too ready to exercise oversight and put aside the judgment of prison administrators; it may be that a constitutional challenge to a disciplinary hearing such as [this] will rarely, if ever be successful. *Ponte v. Real,* 471 U.S. 491, 499 (1985) (citation omitted). There was no arbitrary action in any aspect of the charges, disciplinary proceedings or sanctions involved in the events identified in this action, and there was no constitutional infirmity in the proceedings which would entitle Finfrock to relief in this case. Judgment consistent with this Entry shall now issue. The costs of this action are assessed against the petitioner, Joseph Finfrock.

IT IS SO ORDERED.

LARRY J. McKINNEY, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 97-997-C-T/G

JOSEPH W. FINFROCK,)
)
Petitioner,)
v.)
)
CRAIG HANKS,)
)
Respondent.)

ENTRY

This cause is before the court on the petitioner's notice of appeal. This notice was timely filed in connection with the entry of final judgment in this action on the clerk's docket on October 6, 1997.

The petitioner's notice of appeal is construed as a request for the issuance of a certificate of appealability. A certificate of appealability is a jurisdictional prerequisite to an unsuccessful habeas applicant appealing the denial of relief sought pursuant to 28 U.S.C. § 2254(a). 28 U.S.C. § 2253(1)(A). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). For the reasons stated in connection with the denial of Mr. Finfrock's petition for a writ of habeas corpus, the court does not find that he will be

able to make "a substantial showing of the denial of a constitutional right." Accordingly, the petitioner's implied request for the issuance of a certificate of appealability is **denied.**

The petitioner seeks leave to proceed on appeal *in forma pauperis.* Although this is an action for habeas corpus relief, it is not a continuation of the petitioner's criminal conviction or a challenge to his conviction. Accordingly, the revisions to 28 U.S.C. § 1915(b) enacted as part of the Prison Litigation Reform Act of 1995 apply, and the petitioner must pay the appellate fees of $105.00. *Newlin v. Helman,* 123 F.3d 429 (7th Cir. 1997). He is not entitled to *in forma pauperis* status in his appeal for two reasons: first, the appeal is not taken in good faith, a conclusion the court reaches because no certificate of probable cause has been issued; and second, the petitioner is ineligible to proceed *in forma pauperis* for cases covered by the Prison Litigation Reform Act of 1995, a determination made under 28 U.S.C. § 1915(g) and explained in IP 97-1223-C-T/G. Accordingly, the petitioner's request to proceed on appeal *in forma pauperis* is **denied.**

IT IS SO ORDERED.

JOHN D. TINDER, Judge
United States District Court

Caption omitted (NO. IP 97-997-C-T/G)

ENTRY DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DIRECTING ENTRY OF JUDGMENT

This is an action for habeas corpus relief brought by Joseph Finfrock, an Indiana prisoner. Although Finfrock contends in this action that this sanction was imposed in derogation of his due process rights, the court finds otherwise, and hence must deny his petition for a writ of habeas corpus. This disposition is compelled by the following facts and circumstances:

1. Finfrock was disciplined in a proceeding identified as No. IYC 96-11-0192 for committing the institutional infraction of battery.

2. Inasmuch as Finfrock suffered the loss of a protected liberty interest as a result of the disciplinary proceeding challenged in this case, he was entitled to certain due process protections before that occurred. *Meeks v. McBride,* 81 F.3d 717, 719 (7th Cir. 1996) (citing *Wolff v. McDonnell,* 418 U.S. 539, 557 (1974)). Under *Wolff,* the inmate must receive:

> (a) Advance written notice of the charges against him at least twenty-four hours before the hearing;

(b) The opportunity to be heard before an impartial decisionmaker;

(c) The opportunity to call witnesses and present documentary evidence in their defense when consistent with institutional safety and correctional goals; and

(d) A written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.

Henderson v. United States Parole Commission, 13 F. 3d 1073, 1077 (7th Cir.), *cert. denied,* 115 S. Ct. 314 (1994). In addition, there is a substantive component to the issue, which requires that the decision of a conduct board be supported by "some evidence." *Superintendent v. Hill,* 472 U.S. 445 (1985).

3. Using *Wolff* and *Hill* as an analytical template, each of the recognized procedures were followed or afforded to Finfrock and the record contains "some evidence" of his "guilt" of having committed battery on fellow offender Cory Horn. That is, the record shows that Finfrock received written notice of the charge more than 24 hours in advance of the hearing, that Finfrock participated in the hearing by making a statement concerning the charge (the statement being that he was pushed first), that Finfrock was accompanied at the hearing by a lay advocate, that statements from the witnesses Finfrock had requested were produced and considered, that the hearing officer made a written finding and a summary of the evidence relied on in making its decision and that the hearing officer gave

a written statement of the reasons supporting the sanction which was imposed. Finfrock's contrary arguments rest on either factual arguments which the record refutes (and which must be accepted for the purpose of the present habeas review), or on legal claims which find no support in *Wolff* and its progeny.

4. "We should not be too ready to exercise oversight and put aside the judgment of prison administrators; it may be that a constitutional challenge to a disciplinary hearing such as [this] will rarely, if ever be successful. *Ponte v. Real,* 471 U.S. 491, 499 (1985) (citation omitted). There was no arbitrary action in any aspect of the charge, disciplinary proceeding or sanctions involved in the events identified in this action, and there was no constitutional infirmity in the proceedings which would entitle Finfrock to relief in this case. Judgment consistent with this Entry shall now issue. The costs of this action are assessed against Finfrock.

IT IS SO ORDERED.

JOHN D. TINDER, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 97-998-C-T/G

JOSEPH W. FINFROCK,)
Petitioner,)
v.)
)
CRAIG HANKS,)
Respondent.)

ENTRY

This cause is before the court on the petitioner's notice of appeal. This notice was timely filed in connection with the entry of final judgment in this action on the clerk's docket on October 6, 1997.

The petitioner's notice of appeal is construed as a request for the issuance of a certificate of appealability. A certificate of appealability is a jurisdictional prerequisite to an unsuccessful habeas applicant appealing the denial of relief sought pursuant to 28 U.S.C. § 2254(a). 28 U.S.C. § 2253(1)(A). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). For the reasons stated in connection with the denial of Mr. Finfrock's petition for a writ of habeas corpus, the court does not find that he will be able to make "a substantial showing of the denial of a constitutional right." Accordingly, the petitioner's

implied request for the issuance of a certificate of appealability is **denied.**

The petitioner seeks leave to proceed on appeal *in forma pauperis.* Although this is an action for habeas corpus relief, it is not a continuation of the petitioner's criminal conviction or a challenge to his conviction. Accordingly, the revisions to 28 U.S.C. § 1915(b) enacted as part of the Prison Litigation Reform Act of 1995 apply, and the petitioner must pay the appellate fees of $105.00. *Newlin v. Helman,* 123 F.3d 429 (7th Cir. 1997). He is not entitled to *in forma pauperis* status in his appeal for two reasons: first, the appeal is not taken in good faith, a conclusion the court reaches because no certificate of probable cause has been issued; and second, the petitioner is ineligible to proceed *in forma pauperis* for cases covered by the Prison Litigation Reform Act of 1995, a determination made under 28 U.S.C. § 1915(g) and explained in IP 97-1223-C-T/G. Accordingly, the petitioner's request to proceed on appeal *in forma pauperis* is **denied.**

IT IS SO ORDERED.

JOHN D. TINDER, Judge
United States District Court

Caption omitted (NO. IP 97-998-C-T/G)

ENTRY DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DIRECTING ENTRY OF JUDGMENT

This is an action for habeas corpus relief brought by Joseph Finfrock, an Indiana prisoner. The pleadings and expanded record show that the petitioner was disciplined in a proceeding identified as No. PCF 97-02-0062 for committing the institutional infraction of committing battery on another person. Although Finfrock contends in this action that this sanction was imposed in derogation of his due process rights, the court finds otherwise, and hence must deny his petition for a writ of habeas corpus. This conclusion rests on the following facts and circumstances:

1. Finfrock was confined at the Plainfield Correctional Facility on February 8, 1997, and on that date a conduct report was issued charging that Finfrock committed battery on offender Albert Mancuso by spitting on Mancuso.

2. Finfrock was "screened" on this conduct report on February 10, 1997, meaning that he was supplied with a copy of the conduct report, that he was notified of his procedural rights in connection with the anticipated hearing, that the hearing was scheduled for February 13 or 14, 1997, that he had the right to request witnesses at the hearing and that he had the right to the assistance of a lay representative in some circumstances. Finfrock

responded that he sought a lay advocate, and requested three offenders as witnesses.

3. The hearing was held on February 14, 1997. Finfrock was presented and participated in the hearing by making a statement. Finfrock was also accompanied by the lay advocate of his choice. Statements from the three offender witnesses were submitted. Finfrock's statement, these witness statements and the conduct report were considered. The hearing officer found the conduct report credible, and based on that finding Finfrock was judged guilty. The sanctions which resulted from this proceeding, as modified during Finfrock's administrative appeal, were a period in disciplinary segregation and a demotion in time earning classification.

4. Finfrock seeks relief in the action pursuant to 28 U.S.C. § 2254(a). He is entitled to such relief only if he is "in custody in violation of the Constitution or laws or treaties of the United States."

5. Finfrock's claims are considered in light of the special environment of a prison, where "administrators must be accorded wide-ranging deference in the . . . execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Pardo v. Hosier*, 946 F.2d 1278, 1280-81 (7th Cir. 1991) (internal quotations omitted). They must also be considered in light of the procedural protections of *Wolff v. McDonnell*, 418 U.S. 539 (1974):

a. Written notice of the charge against the prisoner, given at least twenty-four hours prior to the hearing.

b. The right to appear in person before an impartial hearing body.

c. The right to call witnesses and to present documentary evidence, when to do so will not unduly jeopardize institutional safety or correctional goals.

d. A written statement of reasons for the disciplinary action taken.

See also Rasheed-Bey v. Duckworth, 969 F.2d 357, 361 (7th Cir. 1992). In addition, there is a substantive component to the issue, which requires that the decision of a conduct board be supported by "some evidence." *Superintendent v. Hill,* 472 U.S. 445 (1985). *See also Meeks v. McBride,* 81 F.3d 717, 719 (7th Cir. 1996).

6. Finfrock's claims in this case are uniformly without merit:

a. Finfrock first claims that he was entitled to have the hearing conducted by a multi-member board, rather than by a single hearing officer. Nothing in *Wolff* or its progeny recognize such a right.

b. Finfrock next claims that the hearing officer was not impartial, because Finfrock had sued the hearing officer in an unrelated

matter. A prisoner has a right to have a disciplinary hearing conducted by an impartial decisionmaker. *Redding v. Fairman*, 717 F.2d 1105, 1112-13 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Wade v. Farley*, 869 F. Supp. 1365, 1376 (N.D. Ind. 1994). In *Merritt v. De Los Santos*, 721 F.2d 598, 601 (7th Cir. 1983), the Seventh Circuit ruled that the impartiality requirement prohibits an official directly involved in the incident charged from serving as an adjudicator. No such direct involvement or knowledge is alleged in this case. Beyond this fact, Finfrock has not shown actual prejudice. *See Ramirez v. Turner*, 991 F.2d 351, 355 (7th Cir. 1993). *Wolff*'s requirement of an impartial fact-finder in disciplinary proceedings merely requires that a fact-finder not present "a hazard of arbitrary decision making." 418 U.S. at 571; *see also Ramirez*, 991 F.2d at 355; *Walker v. Hughes*, 558 F.2d 1247, 1258 (6th Cir. 1977). A board that follows established procedures, whose discretion is circumscribed by regulations, and which adheres to *Wolff*'s procedural requirements, does not pose a hazard of arbitrariness which violates due process. *Wolff*, 418 U.S. at 571. Accordingly, the court finds no merit in Finfrock's claim that he was denied an impartial decisionmaker in the disciplinary proceeding challenged in this action.

c. Finfrock claims that the hearing officer did not consider the statements of his inmate witnesses. The record of the hearing shows

otherwise. Thus, the factual basis for this claim simply does not exist.

d. Finfrock also contends that he was not provided with a second "credit class" hearing before the credit class demotion was implemented. However, *Wolff* does not require two hearings.

7. "The touchstone of due process is protection of the individual against arbitrary action of the government." *Wolff,* 418 U.S. at 558. There was no arbitrary action in any aspect of the order, charge, disciplinary proceeding or sanctions involved in the events identified in this action, and there was no constitutional infirmity in the proceeding which would entitle Finfrock to relief in this case. Accordingly, his petition for a writ of habeas corpus must be **denied** and his action dismissed with prejudice. The petitioner's submissions of writs of habeas corpus ad testificandum reflects his belief that this court can and should give *de novo* review to the credibility determinations of the hearing officer. Since that is not the case, no writ of habeas corpus ad testificandum shall issue.

8. Judgment consistent with this Entry shall now issue. The costs of this action are assessed against the petitioner.

IT IS SO ORDERED.

JOHN D. TINDER, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 97-999-C-H/G

JOSEPH W. FINFROCK,)
)
Petitioner,)
v.)
)
CRAIG HANKS,)
)
Respondent.)

ENTRY DISCUSSING SELECTED MATTERS

The court, having reviewed the above action, now makes the following rulings:

1. The petitioner's notice of appeal is construed as his request for the issuance of a certificate of appealability.

2. A certificate of appealability is a jurisdictional prerequisite to an unsuccessful habeas applicant appealing the denial of relief sought pursuant to 28 U.S.C. § 2254(a). 28 U.S.C. § 2253(1)(A). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons stated in connection with the denial of Mr. Finfrock's petition for a writ of habeas corpus, the court finds no basis on which to conclude that he will be able to make "a

substantial showing of the denial of a constitutional right" in his appeal. Accordingly, the petitioner's implied request for the issuance of a certificate of appealability is **denied.**

3. Although this is an action for habeas corpus relief, it is not a continuation of the petitioner's criminal conviction or a challenge to his conviction. The Prison Litigation Reform Act of 1995 therefore applies to the petitioner's obligation to pay the filing fee in this case. *Newlin v. Helman,* 123 F.3d 429 (7th Cir. 1997). For two reasons, the petitioner is not entitled to proceed on appeal *in forma pauperis*: first, his appeal is not taken in good faith, *see* 28 U.S.C. § 1915(a)(1), a conclusion evident from the fact that he is not entitled to a certificate of probable cause; and second, the petitioner has "struck out" under 28 U.S.C. § 1915(g) through prior *in forma pauperis* actions which ended in dismissals on grounds of frivolousness. Accordingly, the petitioner's request to proceed on appeal *in forma pauperis* is **denied**.

So ordered.

DAVID F. HAMILTON, Judge
United States District Court

Caption omitted (NO. IP 97-999-C-H/G)

ENTRY DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DIRECTING ENTRY OF JUDGMENT

This is an action for habeas corpus relief brought by Joseph Finfrock, an Indiana prisoner. The pleadings and expanded record show that the petitioner was disciplined in a proceeding identified as No. WVS 97-04-0009 for committing the institutional infraction of attempted escape. Although Finfrock contends in this action that this sanction was imposed in derogation of his due process rights, the court finds otherwise, and hence must deny his petition for a writ of habeas corpus. This conclusion rests on the following facts and circumstances:

1. Finfrock was being transported by Department of Correction officers on April 2, 1997, from the Plainfield Correctional Facility to the Wabash Valley Correctional Facility. According to a conduct report issued that day, while in the back seat of the transportation vehicle he pulled his hands out of the handcuffs and security box which had been placed on his hands and attempted to open the door of the vehicle. The conduct report further recites that, when told to sit down in his seat, Finfrock became unruly and kicked the window on the driver's side, trying to knock the window out, and that this action was accompanied by Finfrock's statement: "Go ahead and shoot me motherfucker, I really don't give a fuck. As soon as I get this window open, I'm gonna

jump out, I don't care how fast you are going, I really just don't care."

2. Finfrock was "screened" on this conduct report on April 4, 1997, meaning that he was supplied with a copy of the conduct report, that he was notified of his procedural rights in connection with the anticipated hearing, that he had the right to request witnesses at the hearing and that he had the right to the assistance of a lay representative in some circumstances. Finfrock did not request either a lay advocate or witnesses.

3. The hearing was held on April 7, 1997. Finfrock was presented and participated in the hearing by making a statement. His statement was that the conduct report was a lie, that he had been taken to an abandoned gas station and taunted with the prospect of escape so that the transporting officers could shoot him. The hearing officer considered Finfrock's statement, as well as the conduct report and the written statements of the two transporting officers, and found the conduct report to be credible. In doing so, the hearing officer specifically noted that he did not believe Finfrock's version of the incident. The hearing officer thereupon found Finfrock guilty and imposed a 3-year period of disciplinary segregation. Finfrock's administrative appeal was denied, and this action followed.

4. Finfrock seeks relief in the action pursuant to 28 U.S.C. § 2254(a). He is entitled to such relief only if he is "in custody in violation of the Constitution or laws or treaties of the United States."

5. Finfrock's claims are considered in light of the special environment of a prison, where "administrators must be accorded wide-ranging deference in the... execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Pardo v. Hosier,* 946 F.2d 1278, 1280-81 (7th Cir. 1991) (internal quotations omitted). They must also be considered in light of the procedural protections of *Wolff v. McDonnell,* 418 U.S. 539 (1974):

> a. Written notice of the charge against the prisoner, given at least twenty-four hours prior to the hearing.
>
> b. The right to appear in person before an impartial hearing body.
>
> c. The right to call witnesses and to present documentary evidence, when to do so will not unduly jeopardize institutional safety or correctional goals.
>
> d. A written statement of reasons for the disciplinary action taken.

See also Rasheed-Bey v. Duckworth, 969 F.2d 357, 361 (7th Cir. 1992). In addition, there is a substantive component to the issue, which requires that the decision of a conduct board be supported by "some evidence." *Superintendent v. Hill,* 472 U.S. 445 (1985). *See also Meeks v. McBride,* 81 F.3d 717, 719 (7th Cir. 1996).

6. Finfrock's first claim is that he was denied his right to a lay advocate.

a. Apart from the fact that Finfrock did not request a lay advocate, due process does not require a lay advocate in every case. This topic was explored in *Miller v. Duckworth,* 963 F.2d 1002, 1004 (7th Cir. 1992). *Wolff* contemplates the need for a lay advocate based on the inmate's illiteracy or the complexity of the case. The case which Finfrock challenges here was not complex, and Finfrock has demonstrated in this and many other cases that he is not illiterate.

b. The circumstances of these cases thus did not trigger a *due process* right to a lay advocate. Equally important, moreover, is that Finfrock has not alleged *prejudice* from the lack of assistance from a lay advocate. The principle of harmless error in these circumstances prevents an inference that Finfrock could be entitled to relief on this portion of his petition. *Powell v. Coughlin,* 953 F.2d 744, 749 (2d Cir. 1991); *Hayes v. Thompson,* 637 F.2d 483, 493 (7th Cir. 1980); *McCall-Bey v. Franzen,* 585 F. Supp. 1295, 1299-1300 (N.D. Ill. 1984).

7. Finfrock's second and seventh claims are that he was denied a fair and impartial decisionmaker.

a. A prisoner has a right to have a disciplinary hearing conducted by an impartial decisionmaker. *Redding v. Fairman,* 717 F.2d 1105, 1112-13 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Wade v. Farley*, 869 F. Supp. 1365, 1376 (N.D. Ind. 1994). In *Merritt v. De Los Santos*, 721 F.2d 598, 601 (7th Cir.1983), the Seventh Circuit ruled that the impartiality requirement prohibits an official directly involved in the incident charged from serving on the adjustment committee.

b. Finfrock's claim that the hearing officer was not impartial relates to the fact that the hearing officer formerly supervised the transporting officers at the Plainfield Correctional Facility. This fact, if it is a fact, does not support an inference that the hearing officer was not impartial. The hearing officer is not alleged to have been present in the transportation vehicle during the incident, nor to have participated in the investigation. Secondly, Finfrock has not pointed to any evidence in the record to suggest that the hearing officer did not properly discharge his duties. *See Ramirez v. Turner*, 991 F.2d 351, 355 (7th Cir. 1993).

c. *Wolff*'s requirement of an impartial fact-finder in disciplinary proceedings merely requires that a fact-finder not present "a hazard of arbitrary decision making." 418 U.S. at 571; *see also Ramirez*, 991 F.2d at 355; *Walker v. Hughes*, 558 F.2d 1247, 1258 (6th Cir. 1977). A board that follows established

procedures, whose discretion is circumscribed by regulations, and which adheres to *Wolff*'s procedural requirements, does not pose a hazard of arbitrariness which violates due process. *Wolff,* 418 U.S. at 571. Accordingly, the court finds no merit in Finfrock's claim that he was denied an impartial decisionmaker in the disciplinary proceeding challenged in this action.

8. Finfrock's fourth claim is that the conduct report "was filled with errors." This is a reference to the fact that Finfrock asserts a different version of what occurred. The "errors" which afflict the conduct report are therefore simply the reporting officer's version. That version of the incident was found credible by the hearing officer, who had ample evidentiary basis on which to make such finding. That evidence was that Finfrock, a prisoner, slipped out of his restraints while being transported from one prison to another, that he attempted to open the door of the vehicle on the open road, that when the door would not open he kicked at the window to break it and that he proclaimed his attempt to escape to the driver and the other transportation officer. Due process in these circumstances requires only "some evidence," not that the evidence be free of conflict. "The Federal Constitution does not require evidence that logically precludes any conclusion but the one reached by the disciplinary board." *Hill,* 472 U.S. at 457. Since there was some evidence that Finfrock attempted to escape, and in fact that his attempts were accompanied by a blatant announcement of his purpose and plan, there is no

merit to his challenge to the sufficiency of the evidence.

9. Finfrock's fifth claim is that he was denied a segregation confinement report within the 24-hours permitted under Indiana prison regulations. This claim, whether factually true or not, does not support relief in this case because it rests solely on the asserted violation of a state rule, not on the violation of any recognized procedural or substantive protection. *Del Vecchio v. Illinois Dept. of Corrections,* 31 F.3d 1363, 1370 (7th Cir. 1994) (habeas corpus jurisdiction is limited to evaluating alleged violations of federal statutory or constitutional law), *cert. denied,* 115 S. Ct. 1404 (1995); *Colon v. Schneider,* 899 F.2d 660, 672-73 (7th Cir. 1990).

10. Finfrock's sixth claim is that three disciplinary reports were written and signed by one person. Although the context of this claim is somewhat unclear, the court finds no due process violation alleged. The present case involves a challenge to only one disciplinary proceeding. There is no suggestion that Finfrock received multiple punishments for a single misdeed. On the contrary, if one person wrote three conduct reports, the inference is that there were multiple violations of institution rules alleged, which could be readily understood from Finfrock's unruly and dangerous behavior.

11. "The touchstone of due process is protection of the individual against arbitrary action of the government." *Wolff,* 418 U.S. at 558. There

was no arbitrary action in any aspect of the order, charge, disciplinary proceeding or sanctions involved in the events identified in this action, and there was no constitutional infirmity in the proceeding which would entitle Finfrock to relief in this case. Accordingly, his petition for a writ of habeas corpus must be **denied** and his action dismissed with prejudice. Judgment consistent with this Entry shall now issue. The costs of this action are assessed against the petitioner.

IT IS SO ORDERED.

DAVID F. HAMILTON, Judge
United States District Court

(2)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

Case Number 00-483

Supreme Court, U.S.
FILED
OCT 16 2000
CLERK

CRAIG A. HANKS, *Superintendent,*
Wabash Valley Correctional Facility,

Petitioner,

vs.

JOSEPH W. FINFROCK,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Joseph F. Finfrock, in accordance with Rule 39 of this Court, respectfully moves the Court to proceed in forma pauperis, and in support thereof states as follows:

1. He is an indigent inmate of the Wabash Valley Correctional Facility, Carlisle, Indiana,.

2. He was granted in forma pauperis status by the United States District Court for the Southern District of Indiana, Indianapolis Division, and the United States Court of Appeals for the Seventh Circuit, and the Court of Appeals appointed the undersigned attorney to act as *amicus curiae* to advocate issues on behalf of Respondent.

3. Attached hereto and incorporated herein by reference is Respondent's declaration in the form prescribed by the Federal Rules of Appellate Procedure, Form 4.

2nd

For these reasons, Joseph F. Finfrock, respectfully moves the Court for leave to file the attached Brief in Opposition without the filing of costs and to proceed in forma pauperis before this Court.

Dated October 16, 2000

Respectfully submitted,

HOWARD B. EISENBERG

P.O. Box 1476
Milwaukee, WI. 53201-1476

(414) 288-1768
FAX (414) 288-6403
E-MAIL: Howard-Eisenberg@excite.com

ATTORNEY FOR RESPONDENT

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

SUPREME COURT OF THE UNITED STATES

CRAIG A. HANKS, *Petitioner*,

v.

Case No. 00-483

JOSEPH W. FINFROCK, *Respondent*.

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C § 1621.)

Signed: Joseph W Finfrock

Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: 10-2-00

My issues on appeal are: Respond to State of Indiana's Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

I have been in prison for the past 7 years. I was just recently transfered from Wabash Correctional Facility where I was at for 3 3/4 years. Now I am at Westville Corrections in Westville Indiana where I have been since 8-24-00, I have no money on my account at this time. I have 9¢ on my account as of 10-2-00, 9¢ is all I have to my name Thank You!

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ NA	$ 0	$ NA
Self-employment	$ 0	$ NA	$ 0	$ NA
Income from real property (such as rental income)	$ 0	$ NA	$ 0	$ NA
Interest and dividends	$ 0	$ NA	$ 0	$ NA
Gifts	$ 41.00	$ NA	$ 0	$ NA
Alimony	$ 0	$ NA	$ 0	$ NA
Child support	$ 0	$ NA	$ 0	$ NA
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ NA	$ 0	$ NA
Disability (such as social security, insurance payments)	$ 0	$ NA	$ 0	$ NA
Unemployment payments	$ 0	$ NA	$ 0	$ NA
Public-assistance (such as welfare)	$ 0	$ NA	$ 0	$ NA
Other (specify): _____	$ 0	$ NA	$ 0	$ NA
Total monthly income:	$ 41.00	$ NA	$ 0	$ NA

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
Sally's place	Chesterfield In	9-21-93	600.00

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.) I am not married.

Employer	Address	Dates of employment	Gross monthly pay
NA			
NA			
NA			

4. How much cash do you and your spouse have? $ .9¢
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution have spouse has	Type of account	Amount you	Amount your
None		$ 0	$ 0
None		$ 0	$ 0
None		$ 0	$ 0

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value)	Other real estate (Value)	Motor vehicle #1 (Value)
None	None	Make & year: None
None	None	Model: None
None	None	Registration #: None

Motor vehicle #2 (Value)	Other assets (Value)	Other assets (Value)
Make & year: None	None	None
Model: None	None	None
Registration #: None	None	None

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	None	None

None	None	None
None	None	None

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Angela Fintock	daughter	9
Danny Smith	son	11

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real-estate taxes included? ___Yes ___No N/A Is property insurance included? ___Yes ___No N/A	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)	$ 0	$ 0
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$ 0	$ 0
Installment payments	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Credit card (name): _____	$ 0	$ 0
Department store (name):_____	$ 0	$ 0
Other: _____	$ 0	$ 0

Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?
____Yes ____No If yes, describe on an attached sheet. Idont Know

10. Have you paid -- or will you be paying -- an attorney any money for services in connection with this case, including the completion of this form? ____Yes __X_No
If yes, how much? $_____
If yes, state the attorney's name, address, and telephone number:
_____
_____
_____

11. Have you paid -- or will you be paying -- anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?
____Yes __X _No
If yes, how much? $_____
If yes, state the person's name, address, and telephone number:
_____
_____
_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.
I have no income, I have been imprisoned for the past 9 years.

13. State the address of your legal residence.
Westville Correctional Facility p.o. Box 473
Westville, In. 46391
Your daytime phone number: (___) None
Your age: 42 Your years of schooling: GED
Your social-security number: 267-37-7348

CERTIFICATE

I certify that the applicant named herein has the sum of $ 2.61 on account to his credit at LVCF, the institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution: NONE

I further certify that during the last six months the applicant's average balance in his trust fund account was $ 2.50.

Authorized Officer of Institution

REQUIRED CERTIFICATIONS

Attach to this motion and affidavit: 1) a certified copy of your trust fund account statement (or institutional equivalent), if available, for the six-month period immediately preceding the filing of this action, AND 2) the completed Certificate which follows.

BEST AVAILABLE COPY

LOC: WVC TRANSACTION HISTORY INQUIRY USER: WVC191

OFFENDER NO 940891 NAME: FINFROCK JOSEPH

FROM DATE: 02 / 03 / 2000 TO DATE: 08 / 03 / 2000 STATUS: AC HSE UNIT:

ENDING BALANCE (END OF MONTH) = $2.61

DOCMT NUMBER	TRAN CODE	DESCRIPTION	TRAN TYPE	POST DATE	BATCH NO.	TRAN AMOUNT	ACCOUN NUMBE
WVC 07/27	COMM	46482 / 081	D	07/27/2000	004	$5.75	94089
GHU PK	SP06		C	07/25/2000	008	$8.19	94089
WVC 06/29	COMM	41973 / 069	D	06/29/2000	004	$5.86	94089
GHU PK	SP05		C	06/27/2000	009	$6.02	94089
WVC 06/15	COMM	39657 / 067	D	06/15/2000	005	$0.03	94089
WVC 06/08	COMM	38659 / 066	D	06/08/2000	004	$19.96	94089
0154501475	POMO	C.EASTON	C	05/23/2000	005	$20.00	94089
WVC35052	MEDC	J. FINFROCK	D	05/01/2000	004	$0.15	94089

PAGE : 0001
TRANSACTION INQUIRY COMPLETE
PF2=DISPLAY TRANSACTIONS PF7=PG/UP PF8=PG/DN *PF9=CLEAR SCREEN* PF10=EXIT

Nothing Further. CWM 8/3-00

Case Number 00-483

* * * * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

CRAIG A. HANKS, *Superintendent,*
Wabash Valley Correctional Facility,

Petitioner,

vs.

JOSEPH W. FINFROCK,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

HOWARD B. EISENBERG

P.O. Box 1476
Milwaukee, WI. 53201-1476

(414) 288-1768
FAX (414) 288-6403
E-MAIL: Howard-Eisenberg@excite.com

ATTORNEY FOR RESPONDENT

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* * * * *

IN THE

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Respondent.

BRIEF IN OPPOSITION

ARGUMENT

THIS COURT SHOULD DENY THE CERTIORARI PETITION BECAUSE THE ISSUE RAISED IS A MINOR QUESTION OF HABEAS CORPUS PROCEDURE WHICH SHOULD BE ADDRESSED TO CONGRESS AND WHICH WAS PROPERLY RESOLVED BY THE SEVENTH CIRCUIT.

A. Role of Counsel

Respondent did not ask the Seventh Circuit to appoint counsel to represent him before that Court. Nevertheless, the Court of Appeals appointed the undersigned to argue several issues as *amicus curiae* generally supporting Respondent, but not as

Respondent's counsel. Those issues are listed on page 6, footnote 6, of the Petition for Writ of Certiorari.[1]

Amicus argued that Finfrock properly filed these cases as habeas corpus actions under 28 U.S.C. §2254, and that, as habeas corpus actions, the provisions of the Prison Litigation Reform Act (PLRA), which amended 28 U.S.C. §1915, did not apply to this action. This position was opposed by both the Government of the United States and the State of Indiana. The Court of Appeals agreed with Amicus on those two points.

On the third point, Amicus argued that a certificate of appealability was required to appeal an adverse judgment in such a §2254 case. Mr. Finfrock vehemently objected to this position and, ultimately, the Court of Appeals agreed with Finfrock and not Amicus.

Now that the State of Indiana has sought certiorari, Mr. Finfrock has asked the undersigned to represent him in opposing the petition. However, counsel feels an obligation to acknowledge that the position he will take in this brief is somewhat different than, and, indeed, inconsistent with, the position he took as Amicus.

B. The Statute Plainly Does Not Require a Certificate of Appealability in a Case Challenging the Loss of Good Time Credits as the Result of Prison Discipline.

The certificate of appealability requirement is statutory, and the statue is clear.

---

[1] On several occasions the Seventh Circuit has appointed the undersigned *amicus curiae* to argue issues the Court desired briefed when the party was not represented by counsel. Most recently, the Court appointed him *amicus* to argue an issue on behalf of a *pro se*, but non-indigent, Holocaust survivor who is seeking reparations from Germany for enslaving him during World War II. *Sampson v. Federal Republic of Germany*, Case No. 97-3555, order dated February 8, 2000. These are *pro bono* appointments.

Section 2253(c)(1) reads:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

One of the most obvious things about this statute is that subsection (c)(1)(B) requires a certificate of appealability in *all* cases under 28 U.S.C. §2255, but not in all §2254 cases. Subsection (c)(1)(A) could just as easily have required certificates of appealability in all cases seeking review of "the final order in a proceeding under section 2254." But the statute does not say that.

Instead, Congress limited the need for a Certificate of Appealability to only those cases "in which the detention complained of arises out of process issued by a State court." There is simply no way the present case involves "process issued by a State court." The only complaint Finfrock makes in these actions is that he lost good time, thereby extending his prison time. This decision was not made by a state court. In fact, Indiana forbids prisoners from seeking review of prison disciplinary decisions in any state court. *See, Hasty v. Broglin*, 531 N.E.2d 200 (Ind. 1988). Therefore, at least in Indiana where judicial review of prison disciplinary decisions is impossible, Respondent's "complaint" simply can not arise out of process issued by a state court.

These habeas actions do not relate to anything that ever happened in a state court. Most specifically, these actions do not relate to Respondent's criminal conviction or any evidence, issue, or legal matter that arose in those criminal proceedings or in any

state court. This case no more "arises out of process issued by a state court" than if Finfrock had filed a 1983[2] action, alleging that he was provided inadequate medical care while incarcerated serving his state sentence.

As Congress demonstrated in the very next clause in §2253, it knows how to make a section all-inclusive, if that is what it wanted to do. Indeed, if Congress disagrees with the Seventh Circuit's approach, it can amend the statute and overturn the decision. But, based on the statute as it now exists, the decision of majority of all of the members of the Seventh Circuit was correct and mandated by the clear specification of the statute. There is no reason to review that decision.

C. *This Petition Raises an Arcane Issue of Habeas Corpus Procedure That Will Affect Very Few Cases, There Is No True Conflict Between the Circuits, and Any Concern Regarding the Meaning of the Statutes Should Be Addressed to Congress, and Not the Court.*

For Indiana prisoners, the United States District Court is the court-of-first-instance if the inmate wants to contest his loss of good time. Indiana denies prisoners any type of judicial review for such deprivations. *See, Hasty v. Broglin*, 531 N.E.2d 200 (Ind. 1988). Thus, if the Indiana Attorney General is burdened by having to respond to prisoner disciplinary habeas corpus cases in federal court[3], the problem rests with the Indiana Supreme Court and legislature, not with the federal judiciary. Moreover, if Judge Easterbrook is correct that there are more than one hundred prisoner disciplinary habeas corpus cases each year in the Seventh Circuit–and he cited nothing (*Petition* at 31a) to

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[2] 42 U.S.C. §1983.

[3] *See* footnote 4, at page 10 of the Petition.

support his speculation–one will find that the vast majority of such cases come from Indiana, the single state in the circuit which forecloses state court review of such claims.

Moreover, there is nothing to support Petitioner's assertion that the Seventh Circuit's opinion in this case "affects large number of cases" (*Petition* at 10). Indeed, the State does not cite *a single case* in which any federal court of appeals has required a certificate of appealability in a case in which a prisoner seeks habeas corpus review of a prison disciplinary decision. Petitioner claims that *Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997) conflicts with the decision in this case, but a review of *Hallmark* reveals that the Fifth Circuit decided that the Antiterrorism and Effective Death Penalty Act (AEDPA) did *not* apply to those cases. *Montez v. McKinna*, 208 F.3d 862 (10th Cir. 2000) did not involve a prison disciplinary case at all, but rather was a case involving the transfer of an inmate to an out of state prison. It is highly questionable whether such a claim can be pursued under §2254. *See Moran v. Sondalle*, 218 F.3d 647 (7th Cir. 2000) (forbidding use of §2254 to attack prison transfers). In *Montez* one judge dissented, and a review of the unpublished decisions cited by the *Montez* majority suggest that the two panel members were not even stating the majority rule in that circuit, *Montez*, 208 F.3d at 866, n. 5. Although it is true that both *Montez* and *Hallmark* contain *dicta* that is inconsistent with Judge Wood's opinion in this case, neither of these cases constitute the type of split among the circuits that warrants this Court's consideration of the issue.

In its zeal to restrict prisoner access to federal courts, Congress failed to consider the ramifications of the well established line of cases which requires prisoners to file

§2254 actions, and not §1983 actions, if they wanted to attack the loss of good time.[4] At the time *Preiser* and *Heck* were decided, those who wanted to restrict prisoner litigation in federal court favored the §2254 approach because it required exhaustion of state court remedies, thus delaying and, perhaps, preventing, federal court litigation of such matters.

But in 1996 Congress enacted far broader restrictions on prisoners' access to the federal courts. Within the space of a few days Congress adopted legislation which shut down most prisoner civil rights litigation through the Prison Litigation Reform Act, while it greatly limited habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996. But in their haste to pass politically popular legislation, Congress failed to take cognizance of this small subset of habeas corpus actions–those challenging the loss of good time.

As the Seventh Circuit's decision in this case shows, this legislative oversight has caused the federal courts to grapple with complex issues. Indeed, what is most remarkable about the State of Indiana's certiorari petition is that Petitioner does not seek review of the most significant issue in this case, whether the Prison Litigation Reform Act restrictions apply to habeas actions which seek restoration of lost good time. Instead, Petitioner asks this Court to review a tiny, little, issue that primarily affects only Indiana.

As this case well indicates, Congressional sloppiness in drafting both the PLRA and the AEDPA has led to almost as much litigation as it has foreclosed. The Seventh

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[4] *E.g. Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997)

Circuit applied the clear mandate of the statute. That was correct and proper. If Petitioner is unhappy with this result, the State of Indiana should address its concern to the legislative branch of the federal government, and not this Court.

D. *If a Prisoner Attempts to Appeal a Frivolous Habeas Corpus Case, the District Court or Court of Appeals Can Deny IFP Status, Thus Eliminating the Specter of the Federal Courts Being Flooded with Frivolous Appeals from Prison Disciplinary Habeas Corpuses.*

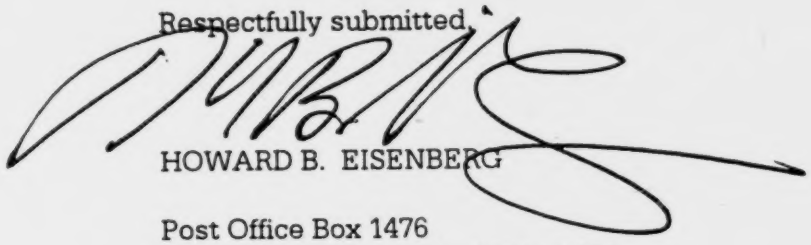
Petitioner is wrong when he asserts that the Seventh Circuit's opinion in this case will lead to increased frivolous appellate litigation (*Petition* at 12). Indeed, on the same day this case was decided by the Court of Appeals, it also decided *Moran v. Sondalle*, 218 F.3d 647 (7th Cir. 2000) which held that a habeas corpus petitioner who tries to pursue a frivolous appeal in a habeas corpus case should be denied *in forma pauperis* status by the district court. It was no mere coincidence that this case and *Moran* were decided the same day. The *Moran* panel referred to the court's decision in the instant case and clearly intended to establish a system whereby frivolous appeals were curtailed, even in cases in which no certificate of appealability was required.

Federal courts have ample weapons to sanction frivolous litigants and to dispose of frivolous appeals. The lack of certificates os appealability in these few cases is hardly an occasion to bemoan any floodgates that may have been opened by the Seventh Circuit's decision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



HOWARD B. EISENBERG

Post Office Box 1476
Milwaukee, Wisconsin 53201-1476

Telephone (414) 288-1768
FAX (414) 288-6403
E-MAIL: Howard-Eisenberg@excite.com

ATTORNEY FOR RESPONDENT

HBE
October 15, 2000